David Saxe Productions, LLC and Vegas! The Show, LLC, Joint/Single Employers *and* Anne Tracy Carter

David Saxe Productions, LLC and Fab Four Live, LLC, Joint/Single Employers *and* Anne Tracy Carter. Cases 28–CA–075461 and 28–CA–084151

August 26, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On May 7, 2013, Administrative Law Judge Eleanor Laws issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents filed an answering brief. The Respondents filed cross-exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.[2]

I. INTRODUCTION

At issue in this case are the Respondents' statements to employees at a meeting where the employees, including Charging Party Anne Carter, raised concerns about their terms and conditions of employment, the Respondents' statements to Carter in a subsequent email, and the discharges of Carter from two of the Respondents' productions. David Saxe is the CEO and owner of Respondent David Saxe Productions, LLC. Saxe also has ownership rights in two Las Vegas shows, *Vegas! The Show* and *The BeatleShow*. Saxe is the owner and managing member of Respondent *Vegas! The Show*, LLC, the corporate entity for *Vegas! The Show*. He serves as the producer for *Vegas! The Show*, which pays homage to the entertainers that made Las Vegas famous from the 1940s to the 1970s and features singers and showgirl dancers. In addition, Saxe and Terry "Mick" McCoy are equal co-owners of Respondent Fab Four Live, LLC, the corporate entity for *The BeatleShow*.[3] *The BeatleShow* stars four men who portray the Beatles and includes a number of other characters and dancers. Anne Carter is a dancer in both *Vegas! The Show* and *The BeatleShow*. Carter signed an initial contract with *Vegas! The Show* in May 2010, a second contract in December 2010, and an extension of her second contract in April 2011. Although there are no employment contracts for dancers in *The BeatleShow*, Carter consistently performed as a dancer in that production from spring 2011 to December 2011.[4]

As found by the judge, and discussed more fully below, on December 13, 2011,[5] Saxe held a meeting with the *Vegas! The Show* dancers where Carter and other dancers raised a number of issues regarding their terms and conditions of employment. On December 21, Saxe, by email, notified Carter that he would not be renewing her contract with *Vegas! The Show* when it ended on January 2, 2012, effectively discharging her from the production. Shortly thereafter, in a telephone conversation, Saxe informed Carter that she had been taken off the schedule for *The BeatleShow*. Thereafter, Carter did not perform work in either production.

We agree with the judge, for the reasons she states, that the Respondents violated Section 8(a)(1) during the December 13 meeting by prohibiting employees from engaging in protected concerted activity and by disparaging employees, impliedly threatening them with discharge, and threatening them with unspecified reprisals because they engaged in protected concerted activity. We also agree

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that *DirecTV U.S. DirecTV Holdings,* 359 NLRB No. 54 (2013), cited by the judge, was reaffirmed in 362 NLRB No. 48 (2015). In addition, we do not rely on *Teamsters Local 25*, 358 NLRB 54 (2012), cited by the judge.

[2] We shall amend the judge's conclusions of law and remedy to conform to our findings. We shall also modify the judge's recommended Order to conform to our findings, to the Board's standard remedial language, and in accordance with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). In addition, we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[3] The judge found that Respondents David Saxe Productions, LLC, Vegas! The Show LLC, and Fab Four Live, LLC are a single employer. The Respondents do not except to this finding. We therefore find it unnecessary to pass on the General Counsel's contention that these three entities are also joint employers, as such a finding would not materially affect the remedy. See *Turtle Bay Resorts*, 353 NLRB 1242, 1242 fn. 5 (2009), incorporated by reference in 355 NLRB 706 (2010), enfd. 452 Fed.Appx. 433 (5th Cir. 2011).

[4] The Respondents do not except to the judge's finding that Carter was an employee of *The BeatleShow*.

[5] Unless otherwise noted, all dates are 2011.

with the judge's dismissal of the allegation that the Respondents violated Section 8(a)(1) during the December 13 meeting by promulgating and enforcing an overly broad and discriminatory rule prohibiting employees from complaining about wages, hours, and terms and conditions of employment. In addition, we agree with the judge that the Respondents violated Section 8(a)(1) in the December 21 email by threatening that failure to cease engaging in protected activity would result in discharge.[6] Further, we agree with the judge that the Respondents violated Section 8(a)(1) by maintaining the "non-union" provision in their employment agreements, requiring employees to acknowledge that their employment is not under the jurisdiction of any union, with penalties for breaching this provision.[7] For the reasons discussed below, however, we find, contrary to the judge, that the Respondents violated Section 8(a)(1) by discharging Carter from *Vegas! The Show* and *The BeatleShow* for engaging in protected concerted activity.[8]

II. FACTS

A. Carter's Background with Vegas! The Show and The BeatleShow

Auditions for *Vegas! The Show* were held from late April until mid-June 2010. Together with Saxe, Tiger Martina, the show's choreographer, selected the initial cast of four men and eight women. One of those women was Carter, who signed an initial contract in May 2010 and performed with the show until her contract was not renewed in December 2011. During this time, Carter performed approximately 12 shows per week. Among the dancers, Carter was perceived to be hardworking but as frequently "complaining" in the dressing room about topics ranging from boyfriends to working conditions.

According to Martina, a few months into the show, he developed concerns about Carter. Specifically, he did not feel that Carter was a good fit because she did not have a strong grip on the show's style, she appeared stiff, and she was not versatile. Martina directed dance captains Ryan Kelsey and Claudia Mitria to work with Carter. When Carter's contract first came up for renewal in December 2010, Martina told Saxe that he wanted to let Carter's contract expire because she did not do some of the choreography correctly and had attitude issues backstage. In addition, in October or November 2011, Martina again informed Saxe that he wanted to replace Carter because of her performance and attitude issues. Likewise, Kelsey began expressing concerns to Saxe and Martina about Carter's performance and attitude in approximately December 2010. As dance captain, Kelsey was tasked with providing the dancers "notes" about their performance and what they could improve. According to Kelsey, Carter was defensive in receiving the notes and was also a negative influence backstage. Despite these concerns, Carter was never disciplined for her performance or counseled about her backstage attitude. Moreover, although aware of the concerns, Saxe overruled them and offered Carter a new contract for *Vegas! The Show* in December 2010 and, in April 2011, extended her contract until December 2011.

In spring 2011, Saxe decided to use dancers from *Vegas! The Show* in *The BeatleShow*. Carter was informed that she would dance with *The BeatleShow* 2–3 days per week, in addition to her work on *Vegas! The Show*. According to McCoy, who co-owned *The BeatleShow*'s corporate entity with Saxe, Carter was a "qualified dancer," but was "confrontational." As evidence of her confrontational attitude, McCoy testified about Carter raising a concern, shared by other dancers, about the requirement to move a large prop across the stage, as the prop had previously fallen on a dancer. Carter initially asked a stagehand to move the prop for her, but ultimately, at McCoy's direction, agreed to move it herself. McCoy apparently also did not believe Carter possessed the "look" he thought best for *The BeatleShow*. As a result, in the months before Carter's discharge, he limited Carter's performance schedule in *The BeatleShow*.

[6] The judge found that Saxe's December 21 email to Carter, instructing her to cease all complaining in the dressing room, in the context of telling her that her contract would not be renewed, constituted an unlawful threat that failing to cease engaging in protected activity would result in discharge. Unlike our dissenting colleague, we adopt the judge's finding of the violation. The Respondents' exceptions to this finding are limited to challenging the judge's credibility determinations. As stated above at fn.1, the Respondents' arguments in this regard are without merit. By ordering the Respondents to cease and desist making any similar instructions in the future, we fully remedy the violation, regardless of whether those instructions take the form of a threat or a work rule. Therefore, we need not and do not pass on the judge's additional finding that Saxe's comments in the December 21 email also constituted the promulgation of an unlawful work rule.

[7] Our dissenting colleague offers a non-coercive interpretation of the "non-union" provision, based on his understanding of employment practices in the entertainment industry. The Respondent, however, does not advance such an argument, nor is there support in the record for it. In any case, under the circumstances here (including the penalties set forth in the employment agreement for breaching the "non-union" provision), we find that employees would reasonably construe the provision as coercive, even if a noncoercive interpretation, like that advanced by our colleague, were conceivable.

[8] In the absence of exceptions, we adopt the judge's finding that the Respondents violated Sec. 8(a)(1) by maintaining the non-disclosure clause in their employment contracts and the judge's dismissal of the allegation that the Respondents violated Sec. 8(a)(1) during the December 13 meeting by interrogating employees about their protected activity.

B. Saxe's December 13 Meeting with the Vegas! The Show Dancers

Following the November 2011 termination of Darlene Ryan, company and production manager for *Vegas! The Show*, many of the dancers had concerns about who they should approach with problems or issues with the show. On December 13, at the dancers' request, Saxe went to the women's dressing room after the show to speak with them about this matter. Carter, who took the lead in responding, began by noting Ryan's recent termination and stating that cast morale was low. She told Saxe that the dancers wanted someone in the chain of command to whom they could voice issues and concerns. Dancer Natacha Boychoure inquired about the potential for incentives for dancers who had been with the show from the beginning, as well as rehearsal and holiday pay.

In response, Saxe asked why the dancers were "bitching" and, apparently rhetorically, asked whether their employment contracts provided for these things. Boychoure assured Saxe that they were not "bitching," but instead had legitimate concerns about their working conditions. Carter then reiterated the request for rehearsal pay, noting that the dancers' employment contracts stated the matter was within Saxe's discretion. Saxe responded, "All you do is bitch, bitch, bitch. I give you a job and all you do is bitch." Carter and dancer Amanda Nowak again assured Saxe that they were not bitching and just wanted open communication and to have their concerns addressed. Carter then raised several issues, including that the requirement to dance 6 nights per week did not leave sufficient time to attend to injuries, the first show often started late leaving insufficient time to prepare and stretch for the second show, and doing "vanities"[9] before the show cut into the dancers' preparation time. Saxe told the dancers that he understood and would try to work on scheduling issues, but stated that he did not want "all this bitching."[10]

Following the December 13 meeting, two dancers approached Saxe and complained about Carter's attitude in the dressing room. Some time thereafter, Saxe solicited feedback from Martina and the dance captains about Carter's performance. Martina and Kelsey recommended that Carter's contract not be renewed, reiterating the same performance and attitude concerns they had been expressing since May 2010 and December 2010, respectively. Mitria recommended that Carter's contract not be renewed based on her attitude issues alone.

About a week after the December 13 meeting, Carter noticed Saxe meeting with the other dancers about their contracts. On December 21, she emailed Saxe stating that she had not had a chance to speak with him and asking if she could schedule a time to do so. Saxe responded with an email entitled "Not renewing you," which stated:

> Hi Anne,
>
> Due to your constant negative attitude and lackluster performance I will not be renewing your contract for Vegas The Show. Your contract ends January 2. I hope that you are professional enough to finish your contract and I would appreciate it of [sic] you could cease all of the complaining in the dressing room. Your fellow cast members would really appreciate it. Constant complaining and negativity just cant [sic] be tolerated anymore.
>
> Thank you for all of the good things you have done in the past. Call or email me any questions you might have. I tried to talk to you in person but you left last night.
>
> David Saxe

Around December 23, Carter called Saxe to say that she felt blindsided by her discharge. According to Carter, Saxe said that he knew her "type," that all she did was bitch, that she was the most negative person in the dressing room, that none of the other dancers could stand her, and that Martina thinks she's a "pain in the ass." After this conversation with Carter, Saxe called McCoy to see if McCoy still wanted Carter in *The BeatleShow*. McCoy said that he did not. At the hearing, McCoy testified that he told Saxe that Carter was "problematic" and that he wanted to see other dancers in *The BeatleShow*. Saxe then called Carter back, asked if she would be finishing out her contract in *Vegas! The Show*, and informed her that she would no longer be performing in *The BeatleShow*. A couple of days later, Carter ran into Mitria and expressed her concern that she had not been warned that anything was wrong. Carter also spoke with Kelsey, expressing some of the same concerns. Carter recalled Kelsey saying, "Unfortunately David flies off the handle and doesn't like it when people talk back to him."

III. DISCUSSION

The judge dismissed the allegations that the Respondents unlawfully discharged Carter from *Vegas! The Show* and *The BeatleShow* because of her protected concerted

[9] The female dancers are required to do "vanities" before the show, which entail one dancer getting ready in a pretend dressing room in the audience's view. The vanities last for about 10 minutes and are on a rotating schedule.

[10] As stated, we adopt the judge's findings that Saxe's comments at the December 13 meeting violated Sec. 8(a)(1) by prohibiting employees from engaging in protected concerted activity, disparaging employees for engaging in protected concerted activity, threatening employees with unspecified reprisal for engaging in protected concerted activity, and impliedly threatening employees with discharge for engaging in protected concerted activity.

activity. For the reasons discussed below, we find merit in the General Counsel's exceptions to these dismissals.

A. Carter's Discharge from Vegas! The Show

Our analysis of Carter's discharge from *Vegas! The Show* is governed by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under that framework, the General Counsel has the initial burden to prove that an employee's Section 7 activity was a motivating factor in the employer's action against the employee. The elements commonly required to support the General Counsel's initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. See, e.g., *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected concerted activity. Id. The employer does not meet its burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. See, e.g., *Bruce Packing Co*., 357 NLRB 1084, 1086–1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015). If the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct. See *Golden State Foods Corp*., 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp*., 255 NLRB 722 (1981).

The judge found, the Respondents do not dispute, and we agree that the General Counsel met his initial burden of showing that Carter's protected concerted activity was a motivating factor in her discharge. Carter engaged in protected concerted activity at the December 13 meeting when she, together with other dancers, raised concerns to Saxe about their working conditions. Specifically, Carter addressed the lack of rehearsal pay and asserted that the show's schedule provided only limited preparation time between performances and did not leave sufficient time for the dancers to attend to injuries. Saxe was clearly aware of Carter's protected activity, as he was present at the December 13 meeting and engaged with Carter on the issues she raised. In addition, the Respondents' animus is well supported in the record. As the judge found, Saxe's decision not to renew Carter's contract occurred soon after the December 13 meeting. The Board has long held that the timing of an adverse action shortly after an employee has engaged in protected activity will support a finding of unlawful motivation. See *Real Foods Co*., 350 NLRB 309, 312 (2007); *Davey Roofing, Inc*., 341 NLRB 222, 223 (2004). In addition, the judge pointed to the Respondents' numerous contemporaneous Section 8(a)(1) violations, including Saxe's characterization of the dancers' concerns about pay and injury as "bitching" and the existence of unlawful provisions in the dancers' contracts, and found that they showed that the Respondents took "a dim view of protected concerted activity among the dancers." It is well established that proof of an employer's discriminatory motivation may be based on evidence of the employer's contemporaneous commission of other unfair labor practices. See, e.g., *Amptech, Inc*., 342 NLRB 1131, 1135 (2004), enfd. 165 Fed.Appx. 435 (6th Cir. 2006). Furthermore, although not relied on by the judge, we infer the Respondent's animus from evidence that establishes that the reasons it offered for Carter's discharge were pretextual. See *Fluor Daniel, Inc*., 304 NLRB 970, 971 (1991), enfd. mem. 976 F.2d 744 (11th Cir. 1992). As explained below, Saxe offered shifting reasons for Carter's discharge and claimed to have relied on performance and attitude problems that other witnesses, credited by the judge, established had been present throughout Carter's employment. Taking into account all of the foregoing considerations, we find that the General Counsel made a strong showing of discriminatory motivation. See *Alternative Energy Applications, Inc*., 361 NLRB No. 139, slip op. at 4 (2014).

Under *Wright Line*, the burden then shifts to the Respondents to demonstrate that they would have discharged Carter even absent her protected activity. Faced with the General Counsel's strong showing of unlawful motivation, the Respondent's rebuttal burden is substantial. See id. at 5 and cases cited therein. We find, contrary to the judge, that the Respondents have not carried that burden.

The judge found that Saxe was the "ultimate decisionmaker" regarding Carter's discharge, but that his stated rationale for her discharge was "a moving target" and his testimony on the subject was "very troubling." At the hearing, Saxe initially testified that he made the decision to discharge Carter after the December 13 meeting, based on his discussions with Martina, Kelsey, Mitria, and other dancers about Carter's negative attitude. After being recalled to the witness stand, however, Saxe testified that he made the decision not to renew Carter's contract much earlier, in October, and did not base his decision on concerns about Carter's complaining in the dressing room. The judge acknowledged that Saxe's testimony regarding the reasons for Carter's discharge suffered from serious

credibility issues.[11] Nevertheless, she credited Saxe's initial testimony because it was consistent with the testimony of Martina, Mitria, and Kelsey, all of whom the judge found to be credible. Thus, the judge found that Martina, Mitria, and Kelsey credibly testified that they had expressed concerns about Carter's performance and attitude to Saxe; she then found that those concerns would have led Saxe not to renew Carter's contract even absent her protected concerted activity at the December 13 meeting. We disagree. Although Martina, Mitria, and Kelsey expressed concern about Carter's performance and attitude, we find, for reasons not considered by the judge, that the circumstances of this case warrant a conclusion that Saxe seized upon these concerns as pretext for discharging Carter for her protected activity at the December 13 meeting.

To be sure, the record reflects that Saxe sought input from Martina and the dance captains regarding whether to keep Carter in the days following the December 13 meeting and that they all said that her contract should not be renewed. Their input in this regard, however, was no different than it had been throughout Carter's tenure with *Vegas! The Show*. Carter's purported performance and attitude issues had been problems virtually since the beginning of her employment. As noted, Kelsey had been expressing concerns about Carter's "negativity backstage" for nearly a year and Martina had been expressing his concerns about Carter's dancing for more than 18 months and had previously recommended not renewing her contract. Saxe overruled these concerns, however, and offered Carter a new contract in December 2010 and an extension of her contract in April 2011. In these circumstances, in light of the judge's finding that Saxe's decision not to renew Carter's contract was made only after, and shortly after, Carter's protected activity at the December 13 meeting and Saxe's failure to explain why Carter's performance and attitude issues suddenly became a concern to Saxe after that meeting, we find that Saxe's proffered reasons for Carter's discharge were pretextual.[12]

Our conclusion is supported by the judge's finding that Saxe provided shifting reasons for Carter's discharge. When an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive. See *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), enfd. mem. 165 F.3d 32 (7th Cir. 1998) (published in full 160 F.3d 353 (7th Cir. 1998)); *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 199 (1995); *Dumbauld Corp.*, 298 NLRB 842, 848 (1990). Here, Saxe offered two very different explanations for Carter's discharge. He first testified that, following the December 13 meeting, he spoke with several dancers and learned that Carter's negative attitude was adversely affecting them. Saxe then stated that he got the input of Martina, Kelsey, and Mitria and investigated the complaints raised by the dancers and that those were the reasons for Carter's discharge. The second time he testified, however, Saxe stated that the decision not to renew Carter's contract was made in October, that an audition was held in November to find a replacement for Carter, and that employee complaints were "not at all" a factor in the decision not to renew Carter's contract. Saxe's conflicting testimony leads us to the reasonable inference that his proffered reasons for Carter's discharge were pretextual, offered in an attempt to mask his actual, unlawful motive for discharging Carter.

Having found that the proffered reasons for Carter's discharge were pretextual, we find that the Respondents necessarily fail to meet their rebuttal burden and thus that Carter's discharge was unlawful.[13] In so finding, we note that the Act protects all employees from adverse action by their employer based on their protected activity. In any given case, it is the Board's task to determine whether the alleged discriminatee was indeed discharged because of her protected activity, using the Board's well-established analytical tools. The Respondents here may have had legitimate reasons for wanting to discharge Carter. But, under the Act, given the clear evidence of unlawful motive, that is not enough. See *Bruce Packing*, 357 NLRB at

[11] In discrediting Saxe's testimony, the judge described his testimony as a "moving target," "inconsistent," "problematic," "fail[ing] to withstand scrutiny," "equivocal, imprecise, and uncertain," "very troubling," and "unworthy of credence." Based on her view of Saxe, the judge stated that were she to rest her decision solely on Saxe's testimony, "the outcome would favor Carter."

[12] See, e.g., *Diversified Bank Installations*, 324 NLRB 457, 476 (1997) (employer failed to meet rebuttal burden where it tolerated an employee's employment shortcomings until employee engaged in protected concerted and union activities); see also *MDI Commercial Services*, 325 NLRB 53, 75 (1997) ("Where an employer has tolerated less than ideal performance, it hardly can reverse direction after a union enters the scene and begin penalizing that union's sympathizers for conduct which has been allowed beforehand."), enfd. in relevant part 175 F.3d 621 (8th Cir. 1999).

[13] That other employees spoke up at the December 13 meeting, as the judge found, and were not discharged does not weigh against our finding. See *Graphic Communications Local 1-M (Bang Printing)*, 337 NLRB 662, 675 (2002) ("[U]nlawful motivation is not somehow disproved by the fact that a respondent did not retaliate against each and every employee engaged in statutorily protected activities."). Cf. *McKee Electric Co.*, 349 NLRB 463, 464 fn. 9 (2007) ("'[A] discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents.'"), quoting *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). In any event, every witness who testified about the meeting agreed that Carter took the most prominent role in articulating the employees' concerns.

1086–1087. Rather, the Respondents were required to show that they actually would have discharged Carter absent her protected activity. Because the Respondents have failed to do so, we find that Carter's discharge was unlawful.[14]

B. Carter's Discharge from The BeatleShow

Having found that the Respondents violated Section 8(a)(1) by discharging Carter from *Vegas! The Show*, we find, contrary to the judge, that the Respondents also violated Section 8(a)(1) by discharging Carter from *The BeatleShow*. Like her discharge from *Vegas! The Show*, Carter's discharge from *The BeatleShow* is properly analyzed using the *Wright Line* framework. The judge found it "clear" that Carter's discharge from *Vegas! The Show* "spurred the decision" to discharge her from *The BeatleShow*. In these circumstances, we find Carter's discharge from *The BeatleShow*, like her unlawful discharge from *Vegas! The Show*, to be discriminatorily motivated.

Further, we find that the Respondents have failed to prove that Carter would have been discharged from *The BeatleShow* even absent her protected concerted activity. In finding Carter's discharge from *The BeatleShow* to be lawful, the judge appears persuaded that the Respondents would have discharged her regardless of her protected activity because of McCoy's testimony that he did not like Carter's "look" and, as a result, had already decided to limit her performance schedule in *The BeatleShow*. As explained above, under *Wright Line*, it is the Respondents' rebuttal burden to establish that Carter would have been terminated from *The BeatleShow* even absent her protected concerted activity. The Respondents have not carried that burden. Carter was not discharged from *The BeatleShow* until she was unlawfully discharged from *Vegas! The Show*. The evidence easily satisfies us that this prior, unlawful discharge was the decisive factor in the second discharge. McCoy had already taken action with respect to Carter's "look" by limiting her performance schedule in *The BeatleShow*, not by discharging her. Accordingly, we find that the Respondents violated Section 8(a)(1) by discharging Carter from *The BeatleShow*.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 4 and renumber the subsequent paragraphs accordingly.

4. On or about December 21, 2011, the Respondents violated Section 8(a)(1) by discharging employee Anne Carter from *Vegas! The Show* and *The BeatleShow* for engaging in protected concerted activity.

AMENDED REMEDY

Having found that the Respondents have engaged in unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondents violated Section 8(a)(1) by discharging Anne Carter from *Vegas! The Show* and *The BeatleShow*, we shall order the Respondents to offer her full reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order Respondents to compensate Carter for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters. We shall also order Respondents to remove from their files any reference to Carter's unlawful discharges and to notify her in writing that this has been done and that the unlawful discharges will not be used against her in any way.

In accordance with our recent decision in *King Soopers, Inc.,* 364 NLRB No. 93 (2016), we shall also order the Respondents to compensate Carter for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra.[15]

ORDER

The National Labor Relations Board orders that the Respondents, David Saxe Productions, LLC, *Vegas! The Show*, LLC, and Fab Four Live, LLC, Las Vegas, Nevada, their officers, agents, successors, and assigns shall

1. Cease and desist from

[14] In agreement with the judge, our dissenting colleague is not persuaded that either the timing of the decision to discharge Carter, or the fact that Carter's alleged performance problems were long-known and long-tolerated, supports a conclusion that the Respondents' proffered reasons for her discharge were pretextual. We reject his position essentially for the same reasons that we reverse the judge.

[15] For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, our dissenting colleague would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

(a) Maintaining the "Non-Union" provision in their employment agreements, requiring employees to acknowledge that their employment is not under the jurisdiction of any union, with penalties for breaching this provision.

(b) Maintaining a non-disclosure clause in their employment agreements, which prohibits employees from discussing their wages and working conditions with other employees.

(c) Prohibiting employees from engaging in protected concerted activities.

(d) Disparaging employees for engaging in protected concerted activities.

(e) Threatening employees with unspecified reprisals because they engaged in protected concerted activities.

(f) Impliedly threatening employees with discharge for engaging in protected concerted activities.

(g) Instructing employees that their failure to cease complaining about protected activity will result in the nonrenewal of their employment contracts and thereby result in discharge.

(h) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the "Non-Union" provision in their employment agreement, requiring employees to acknowledge that their employment is not under the jurisdiction of any union and threatening penalties for breaching this requirement.

(b) Rescind the non-disclosure provision in their employment agreement prohibiting employees from discussing their wages and working conditions with each other.

(c) Within 14 days from the date of this Order, offer Anne Carter full reinstatement to her former job at *Vegas! The Show* or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of this Order, offer Anne Carter full reinstatement to her former job at *The BeatleShow* or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(e) Make Anne Carter whole for any loss of earnings and other benefits she has suffered as a result of her unlawful discharges from *Vegas! The Show* and *The BeatleShow*, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(f) Compensate Anne Carter for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(g) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharges of Anne Carter and, within 3 days thereafter, notify Carter in writing that this has been done and that the discharges will not be used against her in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll record, social security payment records, timecards, personnel records and report, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent in question customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If any Respondent has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by that Respondent at any time since September 27, 2011.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official of each respective Respondent on a form provided by the Region attesting to the steps that that Respondent has taken to comply.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 26, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

My colleagues find, among other things, that the Respondents violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by (1) maintaining a "non-union" provision in its employment contracts, (2) discharging employee Anne Carter from her employment as a dancer in two Las Vegas shows, and (3) threatening, in the email discharging Carter, that engaging in protected concerted activity would result in discharge. As explained below, I disagree with these findings.[1]

1. *"Non-Union Acknowledgment" Clause in Employee Agreement*. The Employee Agreement is a document containing 18 numbered paragraphs, including the following one-sentence paragraph 10: "NON-UNION. Artist Acknowledges that the Show is not under the jurisdiction of any labor union." Unlike my colleagues and the judge, I do not believe the Board should find this one-sentence acknowledgment constitutes unlawful interference with protected activity in violation of Section 8(a)(1). I do not think this sentence reasonably constitutes a commitment that would prevent employees from exercising their right to become represented by a union. The judge effectively acknowledged that this case is distinguishable from other decisions dealing with unlawful promises to abstain from union activity. Compare *Noah's New York Bagels*, 324 NLRB 266, 272–273 (1997) (dismissing alleged violation) with *Heck's, Inc.*, 293 NLRB 1111, 1119–1120 (1989) (finding violation) and *La Quinta Motor Inns*, 293 NLRB 57 (1989) (finding violation). In finding paragraph 10 unlawful, the judge relied on its proximity to an unlawful nondisclosure provision (prohibiting the sharing of information about compensation and other terms of the agreement, as to which the Respondents filed no exceptions) and on the Respondents' right to terminate employment "in the event of breach by Artist of any covenant contained herein or for insubordination." As to the judge's first reason, mere proximity to an unlawful provision does not render the "non-union acknowledgement" provision unlawful. As to her second reason, I believe the "non-union acknowledgement" provision is merely an acknowledgment that the "Show" to which the agreement applies is "not under the jurisdiction" of a labor union, and the provision is not a "covenant" that prospectively prevents employees from exercising their right to union representation.

In the performing arts, dancers and other performers may be represented by unions such as the American Guild of Musical Artists (AGMA), Actors' Equity, the American Guild of Variety Artists (AGVA), the Screen Actors Guild (SAG), and the American Federation of Television and Radio Artists (AFTRA), which are collectively known as SAG-AFTRA. Under a common industry practice, many productions from the outset are mounted with the expectation that they will be "union" shows—even though no performers have yet been hired, which means no employees exist who can express a desire for or against union representation. Unlike in the construction industry, where "pre-hire" agreements are permitted under NLRA Section 8(f), the NLRA does not permit the entertainment industry to have "pre-hire" union agreements. Pragmatically, however, performers need to know whether a production is being mounted as a "union" show because (i) unions representing performing artists often have provisions in their constitutions and bylaws or collective-bargaining agreements dealing with union jurisdiction, (ii) many of these unions have overlapping jurisdiction over certain types of performers, (iii) the unions generally discourage or prohibit represented performers from appearing in productions in which other performers are not represented, and (iv) at the time of casting, performers usually seek information about what union will have jurisdiction so that they can determine whether they already belong to the appropriate union or whether they need to make arrangements to join another union.

[1] I agree with my colleagues that, given the judge's unchallenged single-employer finding, it is unnecessary to pass on the General Counsel's contention that the Respondents are also joint employers. I also join my colleagues in adopting the judge's findings that, during a December 13, 2011 meeting, the Respondents violated Sec. 8(a)(1) by prohibiting employees from engaging in protected concerted activity and disparaging them for doing so. In light of those two findings, well-tailored to the Respondents' statements at the meeting, I find it unnecessary to pass on the judge's largely redundant findings, which my colleagues adopt, that the Respondents also threatened unspecified reprisals and impliedly threatened discharge during that meeting. I agree with my colleagues, however, that the judge properly dismissed the allegation that the Respondents promulgated and enforced during that meeting an overly broad and discriminatory rule prohibiting employees from complaining about their working conditions.

Consistent with the above considerations, it is apparent from the Employee Agreement that it relates to a production that has not yet opened. The Agreement (GC Exh. 14) was dated April 27, 2010, and signed May 7, 2010, and the preamble to the Agreement states that it relates to a stage show "tentatively scheduled to open June 14, 2010." Since the production had not yet commenced, and given the context outlined above—a common industry practice where many productions are mounted with the expectation they will be "union" shows, and where performers generally wish to know whether a production is expected to be a "union" show and, if so, which union will have jurisdiction—I believe employees would regard the one-sentence "acknowledgment" in paragraph 10 as a present-tense indication that the yet-to-be-staged production was not expected to be mounted as a "union" show, virtually all performers would want this information before signing a contract to perform in the show, and I do not believe the performers would regard this "acknowledgment" as a restriction on future protected activity, including potential future union organizing.

2. *Discharge of Anne Carter*. I disagree with the majority's finding that the Respondents discharged employee-dancer Anne Carter in violation of Section 8(a)(1) of the Act. My colleagues reverse the judge's decision in this regard, disagreeing with the judge's finding that Carter was lawfully discharged for reasons unrelated to her protected activity. Contrary to my colleagues, I agree with the judge's detailed analysis in support of her finding that the Respondents met their *Wright Line*[2] defense burden to prove that Carter's contract would not have been renewed even in the absence of her protected conduct, and accordingly that the nonrenewal of her contract for "Vegas! The Show" and her related discharge from the "BeatleShow" were lawful. Employment decisions in the performing arts industry involve a high degree of subjective artistic judgment, and this is an area where I believe the Board should afford substantial deference to the judge's credibility determinations and factual findings.

I am unpersuaded by my colleagues' reliance on the timing of the Respondents' decision not to renew Carter's contract, which my colleagues emphasize was made shortly after the December 13, 2011 meeting at which Carter joined other employees in raising concerns about some employment-related matters, together with the fact that Carter's shortcomings as both a dancer and a negative backstage presence had been tolerated for some time. The timing of the December 21, 2011 decision not to renew her contract is not itself suspicious. Her contract was set to expire on January 2, 2012, so the final decision would reasonably be made just before that date. Moreover, the fact that Carter had been given an opportunity to improve in the past does not mean that the Respondents were obligated to disregard Carter's shortcomings indefinitely. Choreographer and Director Tiger Martina testified that he held auditions in November 2011 looking for a replacement for Carter and that Saxe had agreed around that time that Carter's contract should not be renewed when it ended on January 2, 2012. That decision may not have been finalized until late December 2011, but the record establishes that Carter's non-renewal was under serious consideration before she engaged in protected concerted activity on December 13. In my view, the judge appropriately evaluated certain inconsistencies in Saxe's testimony, and she properly relied on the testimony of Martina regarding Carter's shortcomings as a dancer and her inability or unwillingness to take instruction, as well as that of several witnesses whose testimony established that her fellow performers were fed up with the environment Carter fostered backstage, to find that Carter's contract for "Vegas! The Show" would not have been renewed (and relatedly, that Carter would have been discharged from the "BeatleShow") even if she had not engaged in protected concerted activity. In sum, I would adopt the judge's dismissal of these allegations.

3. *Alleged Threat Contained in the Email Advising Carter of Her Discharge*. I also disagree with my colleagues' finding that Saxe's December 21, 2011 email advising Carter of the nonrenewal of her contract—which, among other things, stated that Saxe would "appreciate it" if Carter "could cease all of the complaining in the dressing room"—constituted an unlawful threat to discharge employees for engaging in protected activity. The email could not have been a threat to discharge Carter—since the email itself *informed* Carter that she was discharged, i.e., that her contract, expiring in a matter of days, was not being renewed—and there is no evidence that any other employee saw the email. Thus, I believe the Board cannot reasonably find that the email unlawfully threatened employees in violation of Section 8(a)(1) for engaging in protected activities.[3]

Accordingly, as to these issues, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] My colleagues find it unnecessary to pass on whether the email also promulgated and enforced an overly broad and discriminatory rule. I would find no rule was promulgated. Carter was the only person who saw the email. Thus, the message in the email to "cease all of the complaining in the dressing room" was "never repeated to any other employee as a general requirement." *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41, slip op. at 1 (2014).

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the "Non-Union" provision in our employment agreements, requiring you to acknowledge that your employment is not under the jurisdiction of any union, with penalties for breaching this provision.

WE WILL NOT maintain a non-disclosure clause in our employment agreements, which prohibits you from discussing your wages and working conditions with other employees.

WE WILL NOT prohibit you from engaging in protected concerted activities.

WE WILL NOT disparage you for engaging in protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals because you engaged in protected concerted activities.

WE WILL NOT impliedly threaten you with discharge for engaging in protected concerted activities.

WE WILL NOT instruct you that your failure to cease complaining about protected activity will result in the nonrenewal of your employment contracts and thereby result in your discharge.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the "Non-Union" provision in our employment agreements, requiring you to acknowledge that your employment is not under the jurisdiction of any union and threatening penalties for breaching this requirement.

WE WILL rescind the non-disclosure provision in our employment agreements prohibiting you from discussing your wages and working conditions with each other.

WE WILL, within 14 days from the date of the Board's Order, offer Anne Carter full reinstatement to her former job at *Vegas! The Show* or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Anne Carter full reinstatement to her former job at *The BeatleShow* or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Anne Carter whole for any loss of earnings and other benefits resulting from her discharges, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Anne Carter for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Anne Carter, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharges will not be used against her in any way.

DAVID SAXE PRODUCTIONS, LLC, *VEGAS! THE SHOW*, LLC, AND FAB FOUR LIVE, LLC, SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/28-CA-075461 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273–1940.

Patricia Fedewa, Esq., for the General Counsel.
Bruno W. Katz, Esq. (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on October 16–18 and December 11–12, 2012.[1] Anne Tracy Carter (the Charging Party or Carter) filed the charge in Case 28–CA–075461 on February 27, 2012, and the Acting General Counsel issued the complaint on June 28, 2012. The Charging Party filed the charge in Case 28–CA–084151 on June 28, 2012, and the Acting General Counsel issued a consolidated amended complaint on August 23, 2012.

The issue before me is whether David Saxe Productions, LLC, Vegas! The Show, LLC, and/or Fab Four Live, LLC (the Respondents) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing overly-broad and discriminatory rules, interrogating employees about their protected concerted activities, prohibiting employees from engaging in protected concerted activities, disparaging and threatening employees with discharge and unspecified reprisals for engaging in protected concerted activities, and discharging the Charging Party because of her protected concerted activities. At the hearing, the Acting General Counsel amended the complaint to allege additional individuals were supervisors and to allege the Respondents are a single employer. The Respondents filed a timely answer denying any unfair labor practice occurred. In addition, the Respondents deny they are a joint and/or single employer and assert that certain individuals are not supervisors under the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents engage in various aspects of providing live shows in Las Vegas, Nevada, and admit that at all material times each entity has met the Board's jurisdictional standards.[2] The Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Respondents' Operations

This case primarily concerns two live shows, Vegas! The Show and the BeatleShow.[3] David Saxe (Saxe) is the owner and managing member of Vegas! The Show, LLC, the corporate entity for Vegas! The Show.[4] Vegas! The Show, which Saxe produces, pays homage to the entertainers that made Las Vegas famous from the 1940s to the 1970s, and features the talent of singers and showgirl dancers. Saxe and Terry "Mick" McCoy (McCoy) are equal coowners of Fab Four Live, LLC, the BeatleShow's corporate entity.[5] The BeatleShow stars four men who portray the Beatles. There are other side characters, including an Austin Powers character, a hippie character, a beefeater character and a couple of dancers. The dancing aspects of Vegas! The Show are far more rigorous and central to the performance than in the BeatleShow.

Saxe is the owner and CEO of David Saxe Productions, LLC (DSP). For public relations purposes, Saxe sometimes refers to "David Saxe" the individual and "David Saxe Productions" interchangeably. (Tr. 27–28.)[6] In addition to Vegas! The Show, LLC, Fab Four Live, LLC and DSP, Saxe also has an ownership in several other companies. Saxe Management, LLC, is the management company for Saxe's various companies. (GC Exh. 3.) DSP performs the "office stuff" for Saxe's companies. (Tr. 45.) Saxe does not separately bill his time to his various enterprises.

All the entities Saxe has an ownership or management interest in share the same mailing address on South Commerce Street. The facility at South Commerce encompasses traditional offices, production offices, a dance studio, and a screen room. There are no offices specifically dedicated for Vegas! The Show or The BeatleShow (or their respective corporate entities) at South Commerce or elsewhere. Documents and records concerning both shows are kept at the South Commerce offices. Likewise, neither show has its own separate phone number or email server. Supervisors use DavidSaxe.com as their e-mail tag regardless of which entity employs them. (GC Exh. 8.)

Robert Smith is the chief financial officer (CFO) of DSP. The finance department handles the administrative functions for all the companies under David Saxe Productions. (Tr. 421.) Managed Pay, an outside payroll services firm, handled payroll for DSP and Vegas! The Show prior to January 2012.[7] (Tr. 414.) Thereafter, DSP accounting employee Janien Robertson (Robertson) took over processing payroll and accounts payable. (Tr. 45, 426.) McCoy handles payroll for Fab Four Live, LLC but sends the payroll information to DSP for processing. (Tr. 253–

[1] The hearing was held on these separate dates because witness Tiger Martina was working on a cruise ship and unavailable to testify prior to December 12.

[2] The Respondents stipulated that each entity met the jurisdictional standards following a discussion about outstanding subpoena requests the Acting General Counsel had made in order to establish jurisdiction.

[3] The BeatleShow is repeatedly referred to erroneously in the transcript as the Beetles Show.

[4] Vegas! The Show, LLC and Vegas! The Show are referred to interchangeably in this decision. It is understood that the former is the corporate entity of the latter.

[5] The BeatleShow was previously called Fab Four Live.

[6] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; "GC Br." for the Acting General Counsel's brief; "R. Br. for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

[7] Smith terminated Managed Pay's services because they continued to get the various companies confused. (Tr. 419– 420).

255, 610; GC Exhs. 28–29.) For purposes of insurance and workers' compensation policies, Smith pools the companies to get a better rate. (Tr. 415–16, 611.)

Neither Vegas! The Show, LLC nor Fab Four Live, LLC has an in-house human resources department. (Tr. 415.) DSP oversees human resources services for all of Saxe's companies. DSP's executive vice president and general manager Matthew Resler (Resler) or Robertson signs paperwork for terminations involving Vegas! The Show and processes other employment information. (Tr. 593–595; GC Exhs. 33, 35, 37–41, 49.). Legal issues concerning the shows are referred to DSP. (Tr. 611.) DSP administers COBRA benefits for Vegas! The Show. (GC Exh. 26; Tr. 127–128.)

Nicole Tanner, who worked as a legal secretary in Saxe's office, is listed as the registered agent for Vegas! The Show, LLC. (GC Exh. 7.) DSP and Vegas! The Show, LLC, are parties to a marketing and consulting agreement. (GC Exh. 10.) DSP bills Vegas! The Show for services performed under the agreement. There is no similar agreement between DSP and Fab Four Live, LLC. DSP performs marketing and public relations functions for Vegas! The Show and the BeatleShow. (Tr. 262–263.) Employees from DSP handle the Vegas! The Show website and the BeatleShow website. (Tr. 609–611.)

The shows are performed at the Saxe Theater in the Miracle Mile Mall inside Planet Hollywood. The legal entity Saxe Theater Group leases the space. Pursuant to an agreement between DSP and Saxe Theater Group, DSP promotes shows that play in the Saxe Theater. A runner from DSP routinely goes to the Saxe Theater. The BeatleShow was previously performed at the V Theater, which is leased by V Theater Group. Saxe has an 89 percent interest in V Theater Group.

The performers in Vegas! The Show occasionally rehearse at the South Commerce facility. The BeatleShow performers auditioned at the South Commerce facility and have held a couple of rehearsals there. DSP did not bill either entity.

Performers in Vegas! The Show and the BeatleShow are paid an agreed upon rate per show regardless of how well the show does. Saxe would not permit dancers to sell photos of themselves in costume after the shows. (Tr. 74.) Dancers cannot lease or subcontract their positions in the BeatleShow. (Tr. 77.) Dancers in the BeatleShow consider their work as part-time, and they received 1099 forms documenting their pay.

Performers bring issues or concerns about the BeatleShow to McCoy. (Tr. 329.) McCoy signs the paychecks for the BeatleShow. (Tr. 435.) Nobody at DSP, other than Saxe, makes decisions about work schedules, hiring, termination, rules, supervision, or how many people perform in the BeatleShow. (Tr. 625.) Likewise, nobody at DSP, other than Saxe, controls the dancers' hours, time off or anything to do with work schedules, number of dancers per show, or any rules involving dancers in Vegas! The Show.

B. Vegas! The Show Casting and Early Stages

Initial rehearsals for Vegas! The Show went from late April to mid-June and took place at the South Commerce facility. (Tr. 89–90.) Carter learned about the auditions through a website, VegasAuditions.com. (Tr. 88.) Tiger Martina (Martina) is choreographer and director of Vegas! The Show. In that capacity, he directs the dancers' moves, style and mannerisms. (Tr. 286, 641.) Saxe and Martina ran the auditions and selected the dancers. (Tr. 471, 643.)

The dancers initially selected, including Carter, signed 6-month employment contracts referred to as artist agreements. (Tr. 473.) On May 10, 2010, Carter signed her agreement with Vegas! The Show, LLC to perform in Vegas! The Show. Saxe signed as Vegas! The Show, LLC's authorized representative that same date.[8] (GC Exh. 14.) The initial artist agreements, including Carter's, were for a 6-month term, and required full-time dancers to perform 12 shows per week. The contracts also covered things other than dancing, such as meet and greets with the audience, promoting the show, coming to the show before the performance, and staying after it ends.[9] Following some initial compensated rehearsals, uncompensated follow-up rehearsals and costume fittings totaling less than 4 hours per week were also part of the agreement. Vegas! The Show, LLC maintained the right to terminate the contract with 2 weeks' notice and employees could terminate with 30 days' notice. Paragraph 15 of the contact states: "NON-DISCLOSURE. Employee agrees not to disclose the terms of this Agreement to third parties or fellow employees without the Company's prior written consent." Paragraph 16 states, "NON-UNION. Employee acknowledges the Show is not under the jurisdiction of any labor union." Paragraph 10c states: "Company shall have the right to terminate this Agreement without notice in the event of breach by the employee of any covenant contained herein or for insubordination." That provision further warns the artist of potential monetary liability for the costs incurred in replacing him or her in the event of a breach. (GC Exhs. 14, 31.) The dancers understand there is no requirement for a company to renew an agreement after its expiration. (Tr. 140–141, 208, 241–242, 270–271, 297.)

The dancers were required to attend an orientation meeting at a company called Managed Pay to go over administrative and human resources matters such as signing up for insurance, watching a sexual harassment video, and learning about disability accommodations. Employees also learned about and acknowledged V Theater Group's open door policy, which describes the chain of command for reporting employee concerns.[10] The meeting, which Carter attended on April 27, 2010, lasted a few hours. (Tr. 90, 148, 222–223; GC Exh. 22; R. Exhs. 1, 2.) Saxe repeatedly told the dancers they should contact him with any concerns or questions and he posted his e-mail address and phone number at the theater. (Tr. 150.)

Vegas! The Show had a "soft" opening in June, and the grand

[8] Carter had a contract with another show while she worked in Vegas! The Show. (Tr. 166.)

[9] The initial contracts required the dancer to be present ½ hour prior to the show, but the subsequent contracts required them to be present an hour prior to the show.

[10] Both the disability accommodation policy and open door dispute resolution policy are from the V Theater Group, not Vegas! The Show, LLC. (R. Exh. 1–2.)

opening was August 5, 2010. Dancers work on a schedule rotation performing 2 shows a night, 6 nights per week. (Tr. 93–95.) The show starts at 7 and 9 p.m. and lasts about an hour and 20 minutes. There are generally 10 female dancers in the show, but it can run with 8 if dancers need time off. (Tr. 288–289, 334.). A couple of "swing" dancers know multiple parts and can fill in as necessary. (Tr. 333.).

After the initial dancers were cast, DSP continued to hold periodic auditions. Audition notices usually specified they were for Vegas! The Show, but sometimes the notices were written more broadly in an effort to find talent that may also fit other shows. (Tr. 676, 681; GC Exh. 46.)

The female dancers are required to do "vanities" before the show, which entail one dancer getting ready at a pretend dressing room in the audience's view. This vanities last for about 10 minutes and are on a rotating schedule. The dancers, both male and female, also must do "meet and greets" after the show, which entail one male and one female dancer talking to audience members, posing for pictures with them, etc. Meet-and-greets also are on a rotating schedule and last about 10–20 minutes.

Darlene Ryan (Ryan) was the company manager and production manager for Vegas! The Show from its opening until her termination in November 2011. In that capacity, she took care of scheduling and payroll. She also addressed any issues or concerns the performers had. (Tr. 97–98.) Vegas! The Show has two dance captains, Ryan Kelsey (Kelsey) and Claudia Mitria (Mitria). Initially Kelsey was the only dance captain, but about 6 months into the show, Mitria was added. Since that time, Kelsey has been the male dance captain as well as the dance captain for the entire show and Mitria has been the female dance captain.[11] The dance captains' job involves maintaining the integrity of the show. (Tr. 287–288.) After Ryan's departure, Kelsey and Mitria took over scheduling as well as responsibility for addressing dancers' concerns or questions. They can also recommend personnel actions. (Tr. 296, 319, 367, 372.)

Martina is very specific about the dancing he wants for Vegas! The Show, and expects the dancers to conform to his style. (Tr. 141.) He explained that the style and movement of the dancers is expected to change from scene to scene as the show moves through the different eras it portrays. The dancers are expected to act the part as well as dance it. (Tr. 648.) If a dancer performs a move incorrectly from a technical standpoint, the dance captains are charged with correcting it. Martina, on the other hand, makes artistic or style adjustments. (Tr. 319, 337, 366.) Martina and the dance captains provide the dancers with so called "notes" before and after the shows. The notes, which dancers receive regularly, delineate where the dancers' performance can improve. (Tr. 290, 326.) In addition, Saxe routinely reviews photos from the show and instructs Martina and the dance captains on how to improve it.[12] (Tr. 492, 655–656; R. Exhs. 4–7, 9–14.)

After observing the dancers the first few months into the show, Martina thought Carter did not have a strong grip of the show's style and believed she appeared stiff and not very versatile. He instructed the dance captains to continue to work with her to improve. (Tr. 652–653.) Martina thought Carter smiled and had consistent energy, but noticed she did not change much between one character or scene and the next, which is typical of some shows, but not what he was looking for in Vegas! The Show. (Tr. 671, 688–689.)

C. Carter's First Contract Renewed and Extended

When contracts are approaching expiration, the dance captains give input to Saxe and Martina regarding whether a dancer should be renewed. (Tr. 299, 348–349, 479.) Martina gives his input to Saxe. When Carter's first contract came up for renewal, Martina told Saxe that she did not do some of the choreography correctly and she did not have the right style. He also mentioned her attitude backstage and said he wanted to let her contract expire. (Tr. 479, 653–654; 673.) Saxe decided to keep her and try to get her to improve and cooperate. (Tr. 480, 499, 653–654.)

Carter was retained and signed a new contract on December 26, 2010. It contained the following provision at paragraph 9:

> NONDISCLOSURE/NONDISPARAGEMENT. Artist agrees not to disclose the terms of this Agreement to third parties or fellow Artists without Company's prior written consent. Once again, Artist may not disclose Artists compensation or solicit information regarding anyone else's compensation or other terms of their agreements. If this occurs, Company shall have the right to immediately terminate this agreement and collect damages as set forth in section 6 of this agreement. Artist shall agree not to disparage each other to any person in the media or any manor [sic] during the terms of this agreement and continuing for ten (10) years thereafter.

Paragraph 10 states: "NON-UNION. Artist acknowledges that the Show is not under the jurisdiction of any labor union."[13] Paragraph 6c states: "Company shall have the right to terminate this Agreement without notice in the event of breach by Artist of any covenant contained herein or for insubordination." Paragraph 15 warns the artist of potential monetary liability for the costs incurred in replacing him or her in the event of a breach. (GC Exh. 15.) Matthew Resler, DSP's general manager, signed the contract on behalf of Saxe. (Tr. 168.)

Carter did not recall having conversations with Martina near the expiration of the first contract, but she did recall him raising style concerns at some point. (Tr. 157.) She did not recall Martina or anyone else raising concerns about a negative attitude. (Tr. 157, 171.)

When Kelsey gave notes to Carter, he observed she would usually get defensive rather than make the adjustment and try to adapt. (Tr. 292.) Mitria observed that other dancers also sometimes did not react well when getting notes. (Tr. 348.) Kelsey raised concerns about Carters' reaction to notes with Saxe and

[11] Kelsey can make decisions for the entire cast, but generally Mitria handles the females and he handles the males.

[12] Numerous photos were introduced at the hearing depicting Carter and other dancers in Vegas! The Show. The pictures were admitted into evidence with the express limitation that they are illustrative of the types of photos Saxe and Martina reviewed, but these specific photos were not relied upon at the time the decision was made to let Carter's contract expire. Accordingly, I do not rely on any of the photos specifically in deciding this case.

[13] Other dancers signed agreements with these same provisions. (GC Exh. 32; Tr. 72.)

Martina. He also told Saxe and Martina that he thought Carter was a negative influence backstage. Over time, Kelsey noticed that Carter's dancing style did not align with the style Martina directed. (Tr. 294–295.) Kelsey relayed his opinions about Carter having a negative attitude to Ryan, and he testified that Resler and Ryan addressed attitude with Carter during a meeting at the end of 2010. He was not present when this meeting ostensibly occurred. (Tr. 316–317.) Martina recalled reminding Resler and Ryan to speak to Carter about her performance and attitude, but he was not at the meeting. (Tr. 678.) Carter did not recall Resler and Ryan ever counseling her. (Tr. 171.)

Carter signed an extension of her December 2010 contract on April 26, 2011, with expiration date of January 2, 2012. (GC Exh. 16.)

D. Carter Joins the BeatleShow

In the spring of 2011, Ryan informed the dancers, including Carter, that Saxe had decided to use dancers from Vegas! The Show for the BeatleShow. A few of the dancers volunteered, and Ryan later informed Carter and Monteece Mask (Mask) they would be dancing in the BeatleShow. Mitria and Sara Short were chosen as swings for the BeatleShow, meaning they would be called in if needed. Two female dancers from the original cast remained. (Tr. 101–102, 330.) Martina conducted brief rehearsals for the BeatleShow at DSP. Once the new dancers were added, they initially worked out scheduling among themselves. Carter generally performed in the BeatleShow 2–3 days per week. The show, which runs a little over an hour, starts at 5:30 each night. Dancers are required to be there by 5, and their part of the show lasts 10–15 minutes.[14] There are no employment contracts for dancers in the BeatleShow.

For the most part, the BeatleShow is choreographed but there are some places where the dancers can dance freestyle. (Tr. 331.) The dancers are required to move a large arrow that is part of the set. Carter thought it was a safety issue for the dancers to move the arrow, so she asked a stagehand to move it for her. Carter voiced her concern about this to Ryan. According to Carter, McCoy instructed her to move the arrow herself. (Tr. 112–113). Anna Van Samback, who became the dance captain for the BeatleShow around October 2011, observed that a few other dancers were unhappy about moving the arrow. Van Samback ultimately took over scheduling for the BeatleShow. Carter asked to be scheduled 4 days per week, but Van Samback had contrary instructions. (Tr. 275–276; 443–445.)

E. Fall/Winter 2011 Events and Carter's Non-Renewal

Martina wanted to replace Carter in Vegas! The Show prior to her contract's January 2012 expiration. Martina believed he was "fighting a losing battle" because Carter's performance issues were the same as they had been all along. He also noted that as the show gained traction, he was getting more interest from dancers. (Tr. 677.)

Saxe testified that in October 2011 he made the decision to keep Carter until her contract expired but not to renew it. DSP held an audition on November 18, 2011, to get new dancers and, according to Saxe and Martina, replace Carter.[15] (Tr. 506, 541, 676–677.) Saxe recalled a conversation with Martina, Mitria and Kelesy about upcoming contract renewals and how many new dancers they should look to hire prior to the audition. (Tr. 541, 546.) The advertisement for the audition stated that DSP was auditioning for female dancers with strong technique and a Broadway jazz influence. (R. Exh. 8.) Martina testified it was his decision not to renew Carter, but it was Saxe's role to convey this decision to Carter.[16] Martina's primary reason for wanting to let Carter's contract expire was based on her performance. (Tr. 677–679.)

With Ryan's departure from Vegas! The Show in November 2011, many of the dancers had concerns about who they should approach with problems or issues. (Tr. 226, 304–305, 388.) On December 11, they requested a meeting with Saxe through his assistant, Armando Macias. On December 13, Saxe came into the women's dressing room after the show to talk with the cast.[17] Though specific accounts vary slightly, the following summarizes the gist of the meeting. Carter affirmed Saxe's statement that cast morale was low, noting Ryan's recent termination. She told him the dancers wanted someone in the chain of command to whom they could voice issues and concerns. Saxe asked their concerns and dancer Natacha Boychoure (Boychoure) inquired about the potential for incentives for the dancers who had been there from the beginning, rehearsal and holiday pay.[18] (Tr. 116, 228.) Saxe asked why they were bitching and asked (apparently rhetorically) whether the contract provided for these things. Boychoure said they weren't bitching, and stated that they were supposed to be paid time and a half for nights they only do one show and they never received that pay. Carter asked if they could get paid for rehearsals when a new item was introduced, and noted that the contract said it was up to Saxe's discretion. According to Carter, Saxe responded, "All you do is bitch, bitch, bitch. I give you a job and all you do is bitch."[19] (Tr. 117.) Dancer Amanda Nowak (Nowak) said they were not bitching, they just wanted open communication.[20] (Tr. 228.) Carter also stated they were not bitching, they loved their jobs, but they had some concerns. Saxe asked what the concerns were and Carter said the requirement to dance six nights a week did not leave sufficient time to attend to injuries. Carter also mentioned that

[14] The dancers who perform in the BeatleShow are not required to attend the 6:00 meeting for Vegas! The Show. (Tr. 105.)

[15] Saxe said if he could find four really amazing dancers at the audition, he would potentially not renew the contracts of his four lowest dancers. (Tr. 541.)

[16] On one occasion Martina terminated a performer in Vegas! The Show without first consulting Saxe. (Tr. 678.)

[17] Saxe did not remember the date of the meeting, but thought it was "the 20th or something." (Tr. 546.)

[18] Carter wasn't sure if other dancers who had expressed some similar concerns spoke during the meeting. (Tr. 176–177.)

[19] Nowak's recollection is that Boychoure asked about holiday pay and Saxe noted it wasn't in their contracts and stated, "All you guys do is bitch, bitch, bitch." (Tr. 228.)

[20] Nowak was one of the original dancers in Vegas! The Show. She left the show voluntarily in October 2010, and then performed in it on an on-call basis as a swing dancer and later on a part-time basis (Tr. 225, 237; GC Exh. 32.) Dancer Jennaia Roussel did not think Nowak was present for the meeting. (Tr. 392.)

the first show often started late, which decreased the time between the shows and provided insufficient time to prepare and stretch. She further complained that doing the vanities before the show cut into time to prepare.[21] Saxe said he understood, he would try to work on scheduling issues so that there would be coverage if a dancer got injured, but he didn't want all this bitching. (Tr. 118, 230.) Among the dancers, Carter spoke up the most at the meeting. (Tr. 245.)

Carter recalled the dancers were sitting at their station during the meeting. Carter's station was in the back corner, with a wall to her left and a wall behind her. (Tr. 701; GC Exh. 47.) According to Saxe, dancers Jennaia Roussel and Nicole Hamilton were directly behind Carter making faces and rolling their eyes when Carter was voicing certain complaints. After the meeting they told him Carter was "awful" and she ruins the mood in the dressing room.[22] (Tr. 517–519.).

Toward the end of 2011, Kelsey and Mitria informed Saxe about Carter's backstage negativity when providing input into whether to renew her contract. (Tr. 300, 349, 506.) As an example, Carter had asked to have Thanksgiving off but was required to work. Mask told Kelsey that Carter's handling of the situation ruined her Thanksgiving. (Tr. 300–301.) Kelsey believed Carter's backstage negativity was outweighing any benefit they were getting from her on stage. (Tr. 308.) Some of this negativity centered around holiday pay, scheduling, injuries, and meet and greets. (Tr. 314, 361.) Mitria also recommended that Carter's contract not be renewed. She believed Carter's attitude, not her dancing ability, was the main concern. (Tr. 349–350.)

A week after the meeting, Carter saw Saxe in the theater after the show discussing contract renewals with some of the dancers. She had meet and greet, so was unable to speak with him. The next day, December 21, at 6:54 p.m., Carter sent Saxe the following email message: "Hi David, I didn't get a chance to talk to you yesterday, I was wondering if there will be another time to do that or if I can schedule a time? Thanks, Anne Carter." At 7:59 p.m., Saxe sent Carter the following email message:

> Hi Anne, Due to your constant negative attitude and lackluster performance I will not be renewing your contract for Vegas! The Show. Your contract ends January 2. I hope that you are professional enough to finish your contract and I would appreciate it of your could cease all of the complaining in the dressing room. Your fellow cast members would really appreciate it. Constant complaining and negativity just can't be tolerated anymore. Thank you for all of the good things you have done in the past. Call or email me any questions you might have. I tried to talk to you in person but you left last night. David Saxe

(GC Exh. 20.) Carter received the email during the middle of the first show, and continued with second show.

Carter called Saxe around December 23, and expressed that she felt blindsided. According to Carter, Saxe stated that he knows Carter's "type" and did not expect someone like her to understand. He reiterated that all she does is bitch, she's the most negative person in the dressing room, other cast members can't stand her, and Martina thinks she's a pain in the ass. Carter informed Saxe that she got along with the other dancers, they were all at her Christmas party, and her performance was not lackluster. Carter assured Saxe that, as a professional, she would complete her contract. (Tr. 122–123.) Carter said she was very upset but stated she did not yell at Saxe. Saxe conveyed that Martina did not think her dancing skills were very good, which Carter disputed. (Tr. 211–212.)

Saxe thought he initiated a telephone call to Carter about her contract not being renewed on December 21 and then followed up with an email. (Tr. 546–547, 552–554.) According to Saxe, he called her and was very nice and said would not be renewing her contract. (Tr. 519.) He later testified he sent the e-mail either the day of the conversation, the day after the conversation, or days after the conversation. In his affidavit during the investigation he stated, "After we got off the phone, I sent Anne Carter an e-mail." (Tr. 584–585). Ultimately, Saxe testified that employee complaints about Carter did not factor into the decision not to renew her contract. (Tr. 591–592.)

Saxe called McCoy to see if he still wanted her in the BeatleShow and he said he did not. In addition to concerns about her attitude, McCoy did not think she was the best match for the BeatleShow show because he wanted the dancers to have more of a pretty girl next door look than a Vegas showgirl look. Because of this, he had previously asked Van Samback to only schedule Carter a couple days a week. (Tr. 443–445.) Saxe called Carter back to ask if she would be finishing out her contact in Vegas! The Show, and informed her that she was no longer in the BeatleShow. (Tr. 212, 547–548.)

A couple days later, Carter ran into Mitria and expressed her concern that she was not warned anything was wrong. Mitria said she had voiced any concerns she had to Ryan, and stated she was sorry. Carter also spoke with Kelsey and expressed some of the same concerns. According to Carter, Kelsey said her performance was great. Carter acknowledged that she is outspoken and said tried to phrase thing in a positive way for the greater good of the cast and show. Carter recalled Kelsey saying, "Unfortunately David flies off the handle and doesn't like it when people talk back to him." (Tr. 124–125.)

Carter sent Saxe an email on December 27 recounting the phone conversations they had. Carter expressed that she was blindsided by the nonrenewal of her contract and her dismissal from the BeatleShow. She also requested a copy of her contract and inquired about workers' compensation. (GC Exh. 21.) According to Carter, aside from notes and some routine instructions, she had never been warned her performance was not satisfactory and had not been counseled about her attitude. (Tr. 169–174.) According to Saxe, he witnessed Resler formally writing Carter up for her behavior around June 2011 and said there were multiple written counselings but he did not know where they were. (Tr. 81, 588.)

F. Perceptions about Carter

Van Samback started dancing in Vegas! The Show in July 2011. She observed that Carter complained a lot so she tried to

[21] She also voiced these complaints to Ryan and the dance captains.

[22] Saxe testified they asked him to stay. (Tr. 516.) Roussel recalled that Saxe initiated the discussion. (Tr. 380.)

keep her distance from her. Van Samback thought there was frequent of complaining backstage which caused people to be unhappy. (Tr. 278.) Van Samback believed that Carter was the main person contributing to the tension backstage. (Tr. 278–279.) Roussel began dancing in Vegas! The Show in late 2010. She perceived that Carter always found something to complain about. (Tr. 374.) She believed Carter negatively impacted the mood in the dressing room, and told Saxe it is harder to have positive energy with Carter in the room. (Tr. 376, 381.) Roussel and Mitria perceived Carter was the most vocal about work concerns among the employees. (Tr. 365, 389.)

Tara Palsha, a dancer with Vegas! The Show since its beginning, perceived Carter as a very hard worker, but also thought she complained about even "miniscule" things on a regular basis. She found it hard to be positive and upbeat in the dressing room because of Carter's complaints. (Tr. 405–406.) Some dancers informed Kelsey that Carter was constantly complaining. (Tr. 296.) McCoy perceived Carter as confrontational. (Tr. 441.)

Martina perceived that Carter had a negative attitude backstage that upset others and affected morale and the outcome of the performance. He received complaints from the dance captains, Palsha, as well as wardrobe employees who voiced that she was demanding with the dressers and backstage workers. (Tr. 679–680.)

Nowak observed that Carter was well liked. (Tr. 234.) Several coworkers, including Mitria and Kelsey, attended Carter's 2012 Christmas party.

III. DECISION

A. Threshold Issues

Before turning to the substance of the complaint allegations, I will address the threshold issues of employer status and supervisory status.

1. Joint/Single employer

The Acting General Counsel asserts that DSP, Vegas! The Show, LLC and Fab Four Live, LLC are joint employers or, in the alternative are a single employer.

A joint employer relationship exists where companies amounting to independent legal entities have chosen to handle jointly important aspects of their employer-employee relationship. It is not necessary to demonstrate that the various entities form a single integrated enterprise. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122–1123 (3d Cir. 1982). The standard in a joint employer finding is two entities exert significant control over the same employees, and where it can be shown that these two entities share or co-determine matters governing their essential terms and conditions of employment. See *Capitol EMI*, 311 NLRB 997, 999 (1993); *Marcus Mgmt.*, 292 NLRB 251, 259 (1989). A joint employer must meaningfully affect matters relating to employment such as hiring, firing, discipline, supervision and direction. *Riverdale Nursing Home*, 317 NLRB 881, 881 (1995); *Browning–Ferris Industries*, supra at 1123.

A single employer exists when two or more business entities maybe be considered one. *Parklane Hosiery Co.*, 203 NLRB 597 (1973). To determine whether two or more entities are sufficiently integrated to be considered a single employer, the Board examines four principal factors: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. *Waterbury Hotel Mgmt.*, LLC, 333 NLRB 482, 523 (2001). Not all of these criteria need be present to establish single-employer status, which ultimately depends on all the circumstances of the case, but a highly significant factor is the absence of an "arm's length relationship found amongst unintegrated companies." *Denart Coal Co*., 315 NLRB 850, 851 (1994*); Herbert Industrial Relations Co*., 319 NLRB 510, 524 (1995); *Emsing's Supermarket, Inc*., 284 NLRB 302, 303 (1987), enfd. 872 F.2d 1279, 1289 (7th Cir. 1989). The Board regards the common control of labor relations as an important factor and weighs common ownership less heavily. *Naperville Ready Mix*, 242 F. 3d 744, 752 (7th Cir. 2001) (citing *Fedco Freightlines, Inc*., 273 NLRB 399).

I will first analyze whether the Acting General Counsel has met the burden of proof to establish single employer status. I find DSP, Vegas! The Show, LLC, and Fab Four Live, LLC, satisfy the common ownership factor. Saxe is the owner of both DSP and Vegas! The Show. He is 50-percent owner of Fab Four Live, LLC, which is sufficient to meet the common ownership factor. *Bolivar-Tees, Inc*., 349 NLRB 720, 722 (2007), enfd. 551 F.3d 722 (8th Cir. 2008). I also find the common management factor is satisfied. Saxe Management, LLC is the management company for Saxe's various companies. Saxe himself is the manager of DSP and makes managerial decisions across his various companies. Saxe hires and fires employees for Vegas! The Show. He is listed organizationally as the head of each company. (GC Exhs. 9, 43; R. Exh. 15.) While McCoy handles all performers' issues or concerns about the BeatleShow, Ryan supervised employees for both shows until her termination in late 2011. Saxe determined that he would use dancers from Vegas! The Show for the BeatleShow. In short, Saxe exercises "overall control of critical matters at the policy level*." Emsing's Supermarket*, supra at 302.

The operations among DSP, Vegas! The Show, LLC, and Fab Four Live, LLC, are sufficiently interrelated to satisfy the third prong of the test. Saxe does not separately bill his time to his various enterprises. There are no offices designated for a specific show, and all the entities share the same mailing address. Documents and records concerning both shows are kept at the same offices at the South Commerce facility. Both Vegas! The Show and the BeatleShow use the South Commerce facility for auditioning and rehearsals. DSP does not bill either entity for use of the space. Neither show has its own separate phone number or e-mail server—supervisors use DavidSaxe.com as their email tag regardless of which entity employs them. Moreover, the finance department handles the administrative functions for all the companies under DSP. All the companies are pooled by the CFO for purposes of workers' compensation and other insurance. Further, DSP performs the "office stuff" for Saxe's various companies and oversees human resources matters for all of Saxe's companies. DSP performs marketing and public relations function for Vegas! The Show and the BeatleShow. Additionally, employees from DSP handle the Vegas! The Show and BeatleShow's websites. Legal issues concerning the shows are referred to DSP. DSP agents sign termination papers involving Vegas! The Show employees and process other employment information. DSP administers COBRA benefits for Vegas! The

Show. Although DSP and Vegas! The Show are parties to a marketing and consulting agreement DSP bills Vegas! The Show for services rendered, neither the specific nature of the services nor the price of the services is described in the agreement. DSP and Fab Four Live, LLC do not have a similar agreement even though DSP performs marketing and public relations functions for the BeatleShow.

Finally, as previously noted, DSP, Vegas! The Show, LLC, and Fab Four Live, LLC, maintain centralized control of labor relations. Saxe controls the labor relationship of both employees of the BeatleShow and the Vegas! The Show. It was Saxe who decided to use dancers from Vegas! The Show to perform in the Beatleshow, and Saxe who informed Carter of her discharge from both. DSP employees sign artist agreements for Vegas! The Show employees. In addition, DSP employees process payroll and deal with any legal issues that arise with respect to the dancers' employment.

Based on the foregoing, I find the Acting General Counsel has established single employer status among the companies at issue.

2. Supervisory status

The Acting General Counsel amended the complaint to allege that Mirtria and Kelsey are statutory supervisors. Because none of the issues in this case turn on the supervisory status of either individual, I find it unnecessary to determine whether or not they fall within the definition of supervisor under Section 2(11) of the Act.

B. Alleged 8(a)(1) Violations

The various substantive allegations concern violations of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

1. Contract provisions

Section 4(a) of the complaint alleges that the Respondents DSP and Vegas! The Show violated Section 8(a)(1) by maintaining overly-broad and discriminatory contract provisions, *i.e.* a non-disclosure clause and a nonunion clause.

The Acting General Counsel has the burden to prove, by preponderant evidence, that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 847. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work and the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978).

a. Nondisclosure Clause

The non-disclosure clause, set forth above, explicitly prohibits disclosure of compensation and other terms of employment. The Board has consistently found confidentiality provisions "that expressly prohibit employees expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment, restrain and coerce employees in violation of the Section 8(a)(1) of the Act, regardless of whether the rule was unlawfully motivated, or ever enforced." *The Roomstore*, 357 NLRB 1690, 1714 (2011). As such, the nondisclosure provision is unlawful under *Lutheran Heritage*. See *Waco, Inc*, 273 NLRB 746, 748 (1984); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

b. Nonunion Clause

The clause at issue is a one-line acknowledgement that Vegas! The Show is not under the jurisdiction of a labor union. As the Respondents point out, this is a statement of fact that does not set forth the employer's opinion of unions. The provision does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights. As such, I must determine whether it would reasonably be construed as prohibiting protected activity. For the reasons set forth below, I find that it would.

The Acting General Counsel asserts that the clause is a "yellow dog" provision, i.e. a promise to abstain from union activity. To support this contention, the Acting General Counsel points to *Leather Center, Inc*., 312 NLRB 521, 528–529 (1993). In that case, a provision of the employee manual stated: "Our Company is union free, and we intend to lawfully remain this way. We believe your needs and ours are best met by avoiding the addition of an outside third party to come between us." Id. at 525. The employer required the employees to sign an agreement promising to comply with the manual under threat of discipline including discharge, and the signed agreement was placed in the employees' respective personnel files. Similarly, the Acting General Counsel relies on *La Quinta Motor Inns, Inc.*, 293 NLRB 57, 60–61 (1989), where there was a similar provision along with an acceptance form stating the employees agreed to abide by the employer's policies and procedures as a condition of continued employment. In both cases, the Board found that employees would reasonably believe they were subject to discipline for violating the employer's anti-union policy in violation of Section 8(a)(1) of the Act. The threat of discipline was a key factor both cases; absent the accompanying threat, the handbook provisions would be protected employer speech under Section 8(c) of the

Act. See also, *Heck's Inc.*, 293 NLRB 1111 (1989); *Matheson Fast Freight, Inc.*, 297 NLRB 63 (1989); *Noah's New York Bagels, Inc.*, 324 NLRB 266 (1997).

The provision at issue here does not go as far in that it does not explicitly express the Respondent's opinion or its desire to forever remain nonunion. Particularly in light of the non-union provision's juxtaposition with the non-disclosure clause, along with the threat of contract termination and/or a financial penalty for breach of any provision or for insubordination, however, I find the clause is coercive. The contract requires the dancer to acknowledge that Vegas! The Show is nonunion as a term of employment. If dancers organized, they would no longer be acknowledging the show is nonunion, and would reasonably believe they faced termination and/or a monetary penalty.

The Respondents, citing to a couple of federal sector Equal Employment Opportunity Commission decisions, argue that the clause must be given its plain meaning and I may not infer some unexpressed intention. The law cited, however, is from a different forum governed by different laws, and I am bound by the Board's standards as applied above. Accordingly, I find the Non-Union clause violates Section 8(a)(1) of the Act.

2. Saxe's comments at the December 13 meeting

The complaint allegations at paragraph 4(c) concern Saxe's conduct at the December 13, 2011, meeting with employees. Specifically, the complaint alleges that Saxe: (1) interrogated employees about their concerted activities; (2) prohibited employees from engaging in concerted activities; (3) disparaged employees because they engaged in concerted activities; (4) threatened employees with unspecified reprisals because of their concerted activities; (5) impliedly threatened employees with discharge for engaging in concerted activities; and (6) promulgated an overly-broad and discriminatory rule prohibiting employees from complaining about wages and hours.

a. Credibility

Before addressing the specific allegations, I will address credibility. As noted above, Saxe could not recall the specific date of the meeting, and his testimony repeatedly strayed from the specifics of what was said at the meeting (Tr. 510–515.) Kelsey could not specifically recall whether profanity was used but recalled that the conversation got "heated" and noted that Saxe had said to him previously that rather than "bitch" about problems he would prefer to find productive solutions. Mitria noted that Saxe got "defensive" when Boychoure complained, but other than that her testimony about the meeting was rambling and non-specific. (Tr. 353–355.) Roussel described the meeting as "laid back" and "fair" but did not give specific testimony about what was said. (Tr. 379.) To the extent the accounts of the meeting differ, I find Carter and Nowak's testimony regarding the meeting are highly corroborative and far more specific and credible than Saxe's recollection. Nowak, who still works for the show, testified in a calm and open-ended manner and appeared sincere. Because Nowak is testifying against her own pecuniary interests, I find her testimony to be particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co., Inc*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries, Inc*., 197 NLRB 489, 491 (1972).

b. Legal Standards

The Board's well established test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co.*, 124 NLRB 146 (1959).

Because the complaints regarding the December 13 meeting relate to concerted activity, and because a finding that Carter engaged in protected concerted activity is a necessary element of some later complaint allegations, I will make a threshold determination regarding whether the complaints, including Carter's, were concerted. The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers Industries*, 281 NLRB at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 3 10 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995).

The record is replete with testimony that many of the dancers, including Carter, were concerned about working conditions following Ryan's termination. The meeting was held to address such concerns, and at least two dancers other than Carter voiced concerns about wages, scheduling, and other working conditions. I find, therefore that Carter and the dancers who spoke at the December 13 were engaged in concerted protected activity.

c. Paragraph 4(c)(1): Alleged Interrogation

The employees requested the meeting with Saxe to express concerns they had about the workplace following Ryan's departure. Saxe asked what their concerns were. This is not an interrogation. In closing brief, the Acting General Counsel combined the alleged interrogation and alleged prohibition from engaging in concerted activities into a single paragraph, citing to *Orbit Lightspeed Courier Systems, Inc.*, 323 NLRB 380, 394 (1997); and *Domsey Trading Corp*., 310 NLRB 777, 793 (1993), 16 F.3d 517 (2d Cir. 1994). The portions of those cases cited do not discuss unlawful interrogations. As I find no support for this allegation, I recommend its dismissal.

d. Paragraph 4(c)(2) and (3): Alleged Prohibition and Disparagement

The Respondents contend generally that Saxe is open to feedback and the dancers feel comfortable approaching him. Whether or not this is generally true, the feedback he gave on December 13 in response to concerted complaints violated the Act. Specifically, I credit the corroborated testimony, detailed

above, that Saxe bemoaned the dancers' "bitching" about topics involving pay, hours, and other working conditions.[23]

Though not an outright or explicit prohibition of concerted activity, Saxe used degrading language when he told the dancers he didn't want "all this bitching." As the Board noted in *Orbit,* supra, even if degrading language is common in the workplace, it becomes unlawful when "coupled with disparaging remarks about protected activity." I find here, like in *Orbit,* the disparaging language directed at protected activity would reasonably tend to discourage and interfere with concerted activities, and it therefore violates the Act as alleged. See also *Domsey Trading Corp.*, 310 NLRB 777, 793 (1993), enfd. 16 F.3d 517 (2d Cir. 1994).

e. Paragraph 4(c)(4) and (5): Alleged Threats

When determining if statements amount to threats of retaliation, the Board applies the test of "whether a remark can reasonably be interpreted by an employee as a threat." The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); See also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

I find Saxe's repeated comments that he didn't want to hear any bitching, particularly in the context of a meeting where he was ostensibly present to address known morale issues, would tend to coerce a reasonable employee and constitute an implied threat. I credit Carter's testimony that Saxe stated words to the effect of "I give you a job and all you do is bitch." This explicit reminder of who is in charge is not necessary to establish a threat, however, as the record establishes the employees clearly knew Saxe controlled the show, and specifically the contract renewals. Considering the totality of the evidence, including the contract provisions prohibiting the dancers from disclosing their wages and working conditions and threatening to discipline them for violations, I find Saxe's comments could reasonably be construed as threatening.

In assessing the totality of the circumstances, I have considered Saxe's opinion, shared by some of the performers, that he is accessible to and open with his cast. In the context of the December 13 meeting, however, he clearly did not welcome complaints, and became upset and disparaging when presented with them. Accordingly, I find the Acting General Counsel has met his burden with regard to the complaint allegations in paragraph 4(c)(4) and (5).

f. Paragraph 4(c)(6): Promulgation of Rule Prohibiting Complaints

I see no meaningful difference between the allegation set forth in complaint paragraph 4(c)(2) that Saxe prohibited concerted activity and the allegation that he promulgated an overly broad and discriminatory rule prohibiting complaints about wages and hours. The concerted complaints were about wages, hours, and working conditions. The prohibition and the rule are one in the same.

3. Carter's Vegas! The Show Contract Non-Renewal and Related Allegations

Because the remainder of the allegations are inextricably linked to Carter's discharge, they will be discussed in that context.

a. Carter's Status and Standing

The Respondents assert that Carter was not discharged from Vegas! The Show. Instead, her finite contract was simply allowed to expire in line with industry standards, and she had no reasonable expectation of renewal.

Though recognizing the Board is not bound by state law, the Respondents point to *Touchstone Television Production v. Superior Court*, 208 Cal.App.4th 676 (2012), as instructive. The court in *Touchstone* held that the plaintiff, an actress, had no tort-based cause of action for wrongful termination against public policy based on nonrenewal of her contract. The court held, however, the actress's allegations of retaliation for complaining about unsafe working conditions, a statutory claim, raised a viable cause of action. There is no tort-based assertion regarding Carter's nonrenewal, and therefore I will proceed to analyze her statutory claim on the merits. See *Saipan Hotel Corp.*, 321 NLRB 116 (1996).[24]

b. Vegas! The Show Contract Non-Renewal

Paragraph 4(e) of the complaint alleges that Carter was discharged from Vegas! The Show for her protected concerted activities in violation of Section 8(a)(1) of the Act. To prove an adverse action violates Section 8(a)(1), the Acting General counsel must establish the following elements: (1) the activity must be concerted; (2) the employer must know of the concerted nature of the activity; (3) the activity must be protected by the Act, and (4) the adverse action taken against the employees must be motivated by the activity. *Meyers Industries*, 268 NLRB 493, 497 (1984); *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001). If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980); See also *Signature Flight Support,* 333 NRLB 1250, (2001) (applying *Wright Line* in context of discharge for protected concerted activity).

[23] Saxe's tendency toward using this term is apparent from the transcript. In addition, Saxe himself referred to Boychoure's requests for holiday pay as an "attack". (Tr. 511.)

[24] The remainder of the Respondents' arguments on this point go to the merits of the claim. To the extent the Respondents argue that a cause of action for nonrenewal may be based on retaliation for union activity but not retaliation for concerted protected activity, such a contention has no basis in the law. It is well established that Retaliation claims may rest on union activity (Sec. 8(a)(1) and (3)) and/or protected concerted activity (Sec. 8(a)(a)) alike.

As set forth above, Carter engaged in concerted protected activity when she and other employees voiced complaints to Saxe about working conditions at the December 13 meeting. The real issue is the motivation behind the decision to let Carter's contract expire.

Under Board precedent, improper motivation may be inferred from several factors, including pretextual and shifting reasons given for the employee's discharge, the timing between an employee's protected activities and the discharge, and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc*., 344 NLRB 1188, 1193 (2005); *Promedica Health Systems, Inc*., 343 NLRB 1351, 1361 (2004). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), aff'd mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

The Acting General Counsel asserts the email Saxe sent on December 21, 2011, informing Carter of her nonrenewal is direct evidence of unlawful motivation. The email, sent in response to Carter asking for a meeting to discuss her contract renewal, states:

> Hi Anne, Due to your constant negative attitude and lackluster performance I will not be renewing your contract for Vegas! The Show. Your contract ends January 2. I hope that you are professional enough to finish your contract and I would appreciate it of your could cease all of the complaining in the dressing room. Your fellow cast members would really appreciate it. Constant complaining and negativity just can't be tolerated anymore. Thank you for all of the good things you have done in the past. Call or email me any questions you might have. I tried to talk to you in person but you left last night. David Saxe

(GC Exh. 20.) While I agree that Carter's complaining is clearly stated as a reason for her nonrenewal, Saxe cites her "constant complaining" in the dressing room and references the effect on her coworkers. It is clear, therefore, that the email relies on some "complaining and negativity" other than the concerted complaints Carter voiced at the December 13 meeting.

The coworkers' concerns, detailed above, were that Carter created a negative mood in the dressing room by her frequent complaining. The Acting General Counsel asserts that the dancers who testified about Carter's complaints were generally not believable because they appeared nervous and they work for Saxe, who was present throughout the hearing. I did not find Palsha to be nervous during her testimony, and I found her to be a credible witness. Her demeanor was straightforward, and she did not appear to embellish her testimony. I also found Van Samback to be a credible witness based both on her calm and open demeanor and the fact that her testimony was corroborated by Palsha and other dancers who testified. I likewise credit Kelsey's testimony regarding the complaint from the dancer who said Carter's attitude had ruined her Thanksgiving.[25] The record is replete with testimony that dancers and the dance captains informed Saxe of Carter's proclivity to complain in the dressing room.[26] In addition to coworker complaints, the email refers to Carter's "lackluster performance". Unlike *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958) or *NLRB v. John Langenbacher Co*., 398 F.2d 459, 463 (2d Cir. 1968), upon which the Acting General Counsel relies, the December 21 email, on its face, cites reasons for Carter's non-renewal other than her protected concerted activity. Accordingly, I find the email is evidence of mixed motivation.

The Respondents assert that Martina and Saxe decided not to renew Carter's contract based on her performance and her attitude. (R. Br. 4.) Turning first to Saxe's testimony, his stated rationale for Carter's nonrenewal is somewhat of a moving target. Initially he testified that he talked with Mitria, Kelsey and Martina and then did an investigation by asking other dancers about Carter after his conversation with Roussel and Hamilton following the December 13 meeting. Specifically, after learning Carter's negative attitude was adversely affecting the other dancers, he called Carter and, in an effort to protect the other dancers, simply and politely told her he was not renewing her contract. (Tr. 519.) When recalled to the witness stand after the hearing reconvened, he testified the decision to nonrenew Carter was made in October and employee concerns about Carter's complaining did not motivate this decision. (Tr. 591–592.)

Saxe's testimony about Carter's nonrenewal is also problematic for other reasons. When discussing the November 18 rehearsals to replace Carter, Saxe stated he had decided in October to let Carter's contract expire, and by that time had already spoken to Kelsey and Mitria and received their recommendations supporting this decision. Kelsey, however, recalled that the talk about whether to renew Carter's contract occurred after the December 13 meeting.[27] (Tr. 307.) Moreover, Mitria testified that Carter's dance ability was not in question, but rather her attitude was the main concern. (Tr. 349–350.) Much of Saxe's testimony about the December 13 meeting likewise cannot be credited, as set forth above. In addition, as the Acting General Counsel points out, he testified that Roussel and Hamilton were sitting behind Carter and rolling their eyes, but the evidence shows that Carter was sitting with her back to a wall.

Saxe's testimony regarding alleged counseling Carter received for her performance and attitude presents further credibility problems. First, the testimony alone, aside from any credibility determination, shows that Saxe viewed Carter's "attitude" and not just her performance, as problematic. Saxe then testified there were several "write-ups" yet none could be located. Carter specifically recalled meeting with Resler and Ryan at DSP to sign her new contract, but testified she was not counseled on her performance or attitude. Resler, a current employee, was not called as a witness at the hearing. See *International Automated*

[25] I consider this testimony not for the truth of the matter asserted, but as an example Kelsey conveyed regarding the problems other employees were having with Carter backstage.

[26] At least some Carter's complaints in the dressing room were concerted, as is clear from Palsha's testimony that some of the other dancers "would go along with it" and Roussel's testimony that "there were times when she did have valid—valid points, and there were complaints made by her and other people as well." (Tr. 375, 405.) It has not been established, however, that Saxe knew the concerted nature of the complaints in the dressing room.

[27] He relayed the complaint from the dancer whose Thanksgiving was ruined to Saxe, which obviously occurred after October.

Machines, 285 NLRB 1122, 1123 (1987) (adverse inference appropriate when party fails to call witness who "may reasonably be assumed to be favorably disposed to the party"). Accordingly, I find Carter was not disciplined prior to her nonrenewal, and I credit her testimony that nobody counseled her about her attitude.

Saxe's testimony about how he conveyed the non-renewal to Carter likewise fails to withstand scrutiny. He was not certain about the precise chain of events, but thought he had called Carter before sending her the December 21 email. His email, however, references a failed attempt to talk to Carter in person the previous night, but does not reference a telephone conversation earlier that day. Carter's version of events, that she learned of her non-renewal from the email, is credited both because her testimony was unequivocal and is more inherently plausible. Saxe's testimony that Carter screamed into the phone and was so loud that Smith overheard him is likewise not credited. Smith, who was called as a witness, did not testify about this incident. See *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977) (an adverse inference is appropriate where respondent failed to question its own witness about matters which would normally be thought reasonable). Moreover, Saxe's testimony that he feared Carter would do something violent based on her tone during the conversation does not square with his undisputed request that she finish out her contract.[28]

The timing of events makes it clear that the decision to allow Carter's contract to expire was not finalized until after the December 13 meeting. Saxe solicited feedback from the dance captains regarding whether to renew Carter's contract after this meeting, an action he would not have taken if the decision was a fait accompli.[29]

Carter also recalled telling Kelsey that she knows she is outspoken but tries to voice concerns in a positive manner. Kelsey responded by stating, "Unfortunately David flies off the handle and doesn't like it when people talk back to him." (Tr. 125, 215.). Kelsey, who was called as a witness, did not deny making this statement, and I therefore credit Carter's testimony. See *Colorflo,* supra.

Finally, I have considered the contract provision, noted above, prohibiting dancers from discussing their wages and working conditions, and threatening contract termination and monetary sanctions for any contract violation. This evidence, along with Saxe's description of the complaints the dancers voiced as "bitching," shows the Respondents take a dim view of protected concerted activity among the dancers.

Based on the foregoing, I find Carter's protected concerted complaints were a motivating factor in the decision to let her contract expire. *Webco Industries*, 334 NLRB 608, fn. 3 (2001). As such, the burden of persuasion shifts to the Respondent to show that Carter's contract would not have been renewed even absent her protected concerted activity. See *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 4 fn. 18 (2013); *Signature Flight Support,* supra.

As noted above, the Respondents assert two reasons for Carter's termination: her dance style and her attitude. Saxe's testimony after the hearing was reconvened, i.e. that Carter's complaining did not factor into the decision to let her contract expire, comports with that of Martina, who also testified when the hearing reconvened. As set forth in the statement of facts, Martina's primary concern with Carter was her dance style and her performance in the show. He also had concerns about her attitude and ability or willingness to take instruction and had recommended letting Carter's initial contract expire. According to Martina, he again informed Saxe he wanted to replace Carter in October or November 2011; Saxe agreed, but decided to let her contract expire rather than give her notice and terminate her at the time. I found Martina to be a very credible witness based his thoughtful and forthright demeanor as well as the detailed and consistent quality of his testimony. Though Martina is the choreographer for some of Saxe's shows, I do not find he is beholden to Saxe in the same way a subordinate employee would be. He is not present at Vegas! The Show on a regular basis, and he choreographs shows other than Saxe's.

My belief of Martina's testimony, coupled with the serious credibility problems of Saxe's testimony, presents a conundrum. On the one hand, I do not discredit Martina only because Saxe's testimony changed to better align with Martina's recollection of events. Saxe's testimony in general was often equivocal, imprecise, and uncertain.[30] As noted, I found Martina to be credible and I believe his desire to replace Carter in Vegas! The Show was based on legitimate concerns about her dance style and her attitude. On the other hand, Martina had recommended Carter's nonrenewal in the past to no avail. Despite Martina's testimony that it was his decision not to renew Carter's last contract, Saxe was plainly the ultimate decision-maker, regardless of what he may have told Martina or led him to believe. While I do not doubt that Saxe valued Martina's input, it was clearly not the only thing he considered.

The only one way to square Saxe's internally inconsistent testimony with the other evidence, including the timing of events, the contents of the December 21 email, and witness testimony, is to discredit Saxe's later version of events.[31] More pointedly, Saxe's testimony that he did not consider the input he received about Carter's complaints and the atmosphere she fostered backstage is unworthy of credence in light of all the evidence. As noted, I credit the testimony from Carter's coworkers and the

[28] The Acting General Counsel also notes that Saxe's desire to have Carter finish out her contract casts doubt on the Respondents' claim that the Martina held the November 18 audition in part to replace Carter. No evidence was adduced to determine whether the audition resulted in any dancers deemed to be a good fit for the show, however. Without this evidence, I cannot draw such a conclusion.

[29] The Acting General Counsel also notes that the contract may be terminated with 2-weeks' notice and Martina had taken unilateral action in terminating dancers mid-contract in the past. I do not find this discredits Martina's testimony regarding his concerns about Carter's dance style. He did not point to anything drastic about her performance that would render suspicious his absence of immediate unilateral action, particularly considering he does not usually terminate dancers.

[30] At various points in the trial, Saxe noted his ADHD, medication for allergy/sinus problems were impacting his concentration.

[31] I also consider here the concerns the Acting General Counsel raises about the audition, including the nonspecific nature of the advertisement and the fact that Saxe did not know who replaced Carter.

dance captains that her pervasive complaining created a negative atmosphere backstage. The dance captains both specifically recalled informing Saxe about Carter's attitude and its impact on the other dancers when giving input to him, in late 2011, during a discussion of whether or not to renew Carter's contract. Martina also relayed this information to Saxe, along with his reiterated concerns about her dance style. Though Saxe's testimony is inconsistent, the testimony from the witnesses who provided input into the decision to let Carter's contract expire is not.[32]

The Acting General Counsel argues that Mitria and Kelsey's testimony is inconsistent, pointing to the discrepancy between Martina and Kelsey's testimony about Carter having problems with her dance style and Mitria's testimony that Carter's dance ability was not an issue. As noted in the statement of facts, Martina is responsible for the dancers' artistic and stylistic performance while dance captains' are concerned with the technical aspects of the dancers' performance. Martina noted that Carter provided good and consistent energy and believed her dance style may be well suited for other shows, just not one that required the adaptations Vegas! The Show requires. It is not material that Kelsey noticed some of the style concerns that troubled Martina. Given the facts of this case, I do not find this testimony inconsistent.

As noted above, Roussel and Hamilton directly told Saxe about their problems with Carter's negativity in the dressing room after the December 13 meeting. While I discredit Saxe's testimony about where the dancers were sitting when they were rolling their eyes as Carter voiced complaints, Rousel's testimony that she met with Saxe after the meeting and informed him that Carter created a negative backstage environment is unrefuted.[33] That many of the dancers also were bothered by Carter's negativity backstage, regardless of whether or not they liked her personally, is clear from the testimony of Roussel, Van Samback, Palsha, Mitria and Kelsey. While some of the negativity resulted from complaints about working conditions shared by dancers other than just Carter, the message conveyed up the chain was that of frustration because of the environment Carter fostered backstage by the pervasiveness and perceived minor nature of many of her individual complaints. Though it is a fine line, coworker complaints about a fellow employee's constant complaining about work and working conditions can be a legitimate consideration. See *Good Samaritan Hospital*, 265 NLRB 618, 627 (1982); *Desert Construction*, 308 NLRB 923 (1992). Particularly considering the context of this case is a live show, I find such complaints are a legitimate consideration.

Carter spoke the most at the December 13 meeting. Boychoure, however, requested holiday pay and incentive pay, and Nowak also spoke up at the meeting. Though Saxe perceived Boychoure's concerns as an "attack" and their exchange was described tense, no negative action was taken against her. I find that Carter's concerted complaints at the December 13 meeting, without more, would not have resulted in nonrenewal of her contract. While I find the complaints did not endear Carter to Saxe, I also find that Martina's issues with Carter's dance style, when combined with the input from the dancers and dance captains about her attitude and its impact on the backstage environment, would have led to her non-renewal even had she not engaged in protected concerted activity.

Contrary to the arguments of the Acting General Counsel, I do not find Respondent condoned Carter's poor performance and attitude. Under well-established Board precedent, the "doctrine of condonation" applies where there is clear and convincing evidence that the employer has agreed to forgive the misconduct, to 'wipe the slate clean,' and to resume or continue the employment relationship as though no misconduct occurred." *United Parcel Service*, 301 NLRB 1142, 1143 (1991) (footnote omitted); *Fineberg Packing Co.*, 349 NLRB 294, 296–297 (1989). "[C]ondonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred." *Fineberg Packing,* supra, (quoting *PlastiLine, Inc. v. NLRB*, 278 F.2d 482, 487 (6th Cir. 1960)). Here, the record is insufficient to establish, by clear and convincing evidence, that the Respondents intended to condone Carter's performance. Though her contract was renewed and then extended, she was given notes from the dance captains about how to improve and Martina had spoken to her about her dance style. I likewise do not find hiring Carter for the BeatleShow was condonation. It does not follow that problems with Carter's dance style in Vegas! The Show would result in failure to consider her for the BeatleShow, as the dancing in the two shows is very different.[34] There was nothing concrete Carter did that was forgiven and then used against her, and I find the doctrine of condonation has not been established by clear and convincing evidence.

Assessing the evidence in this case was not an easy task, largely due to the nature of Saxe's testimony. That Saxe, the ultimate decision maker, has provided inconsistent testimony as to his reasons for failing to renew Carter's contract is very troubling. Were I to rest my decision solely on Saxe's testimony weighed against Carter's, the outcome would favor Carter. In the end, however, I am persuaded by the evidence that Saxe based his decision on input from Martina, Mitria and Kelsey, and the other dancers, whose testimony I credit. I find the preponderant evidence shows that without this input, Carter would not have been terminated for her protected concerted complaints.

Based on the foregoing, I recommend dismissal of complaint paragraph 6(e).

c. Alleged Overly-Broad Rule

The complaint, at paragraph 4(d)(1), alleges that Saxe's December 21 email promulgated and enforced an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activities. The email instructs Carter to "cease all of the complaining in the dressing room." Because I have found at least some of Carter's complaints in the dressing room were concerted in nature, I find the email violates the Act as alleged.

[32] Though I do not pass on whether Kelsey or Mitria are statutory supervisors, their testimony that they provided input to Saxe regarding whether or not to renew dancers' contracts is undisputed.

[33] It is also supported by Palsha's testimony that there was a lot of eye-rolling. (Tr. 405.)

[34] As McCoy noted, dancing is not really critical in the BeatleShow. (Tr. 441.)

d. Alleged Threat of Non-Renewal

Paragraph 4(d)(2) of the complaint alleges that Saxe's December 21 email threatens employees that concerted activity will result in non-renewal of employees' contracts, resulting in their discharge. The Acting General Counsel makes no argument in support of this allegation. Though I have found Carter's discharge does not violate the Act, I find that the directive to "cease all complaints in the dressing room" in the context of a letter stating Carter's contract is not being renewed would reasonably construed as a threat. Accordingly, I find the Respondents violated the Act as alleged.

4. Carter's discharge from the BeatleShow

Complaint paragraph 4(f) alleged that Carter was discharged from the BeatleShow in violation of Section 8(a)(1) of the Act.

a. Employee or Independent Contractor

The Respondents assert that Carter's status at the BeatleShow was that of an independent contractor, and she therefore lacks standing to assert her discharge was unlawful. As the Respondents seek to exclude Carter from the Act's protection, it is their burden to prove she was an independent contractor. *BKN, Inc*., 333 NLRB 143, 144 (2001).

To determine whether an individual is an independent contractor or an employee, the Board applies the common-law test of agency, assessing "all of the incidents of the relationship . . . with no one factor being decisive." *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968), enfg. 154 NLRB 38 (1965). Factors relevant to this determination include: (1) whether the putative employer has the right to control the manner and means of performance of the job; (2) whether the individual is engaged in a distinct occupation or business; (3) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain; (4) whether the employer or the individual supplies the instrumentalities, tools, and place of work; (5) the skill required in the particular occupation; (6) whether the parties believe they are creating an employment relationship; (7) whether the work is part of the employer's regular business; (8) whether the employer is "in the business"; (9) the method of payment, whether by time or by the job; and (10) the length of time the individual is employed. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1764 (2011). In *Lancaster Symphony Orchestra*, the Board concluded that an employer-employee relationship existed between an orchestra and its musicians. Id. at 9. The Board so held, applying the aforementioned factors, finding that the orchestra possessed the right to control the manner and means by which the performances were accomplished by choosing the music, deciding how it would be played, when and how the performance would be rehearsed, and how the musicians would appear on stage. The Board also noted that musicians did not bear any entrepreneurial risk of loss or enjoy any opportunity for entrepreneurial gain—the musician's services were a part of the orchestra's routine business with the musicians paid on an hourly basis. Id.

In the instant case the Respondent exercises rights to control the manner and the means of performance. Dancers have no control over the start time of the show and must be at the theater at a certain time prior to the show. The dancers are not permitted to sell photos of themselves to customers after the show. They cannot lease or subcontract out their positions in the BeatleShow Also, dancers wear provided costumes and are required and instructed to move props. See *Production Industries, Inc*., 178 NLRB 707, 708–709 (1969) (entertainers were independent contractors based on large sums of money they spent on costuming and advertising; autonomy of performance). Unlike in *Production Industries, Inc*., the BeatleShow dancers were not required to pay for their own costuming or promotional material. Additionally, the dancers bear no entrepreneurial risk. Performers, including Carter, are paid an agreed upon rate per show regardless of how well the show does. The Respondent provides the place of work and the practice space and audition space. Clearly, the work is part of the Respondent's regular business. Finally, it is important to note that while the dancers had one portion of the BeatleShow where they could dance freestyle, the majority of the show was choreographed. Martina—the choreographer and director of Vegas! The Show—also conducted auditions for the BeatleShow and was consulted regarding choreography and make-up style. Finally, while dancers in the BeatleShow receive 1099 forms documenting their pay, the term of employment with the BeatleShow is indefinite.

The Respondents contend the "right-to-control" test supports the conclusion that Carter is an independent contractor rather than an employee. I do not agree. The evidence establishes that the Respondents reserve the right to control the end results to be achieved and the means by which it is achieved, as described above. Thus, under the right-to-control test, it is apparent that Carter was an employee rather than an independent contractor. *Nevada Resort Association*, 250 NLRB 626, 642 (1980) (noting an independent contractor relationship is found to exist when the employer reserves only the right to control the end results to be achieved but does not control the means by which it is to be achieved). The Respondent contends that the dancers in the BeatleShow are allowed to freestyle and do not have set routines. The further assert the manner in which the dancers are managed indicates minimal control and supervision. However, as noted in *Nevada Resort Association*, it is not the actual exercise of the control but the right to exercise control which is the governing consideration. Id. at 645. Thus, the range of control actually exercised by the Respondents is not outcome determinative. In any event, only a small part of the dancing was freestyle, with the majority choreographed. Finally, the Respondents' contention that the dancers are allowed to work other jobs is equally unpersuasive in finding that Carter was an independent contractor. See *Lancaster Symphony Orchestra,* supra. slip op. at 7 (2011). Based on the foregoing, I find Carter was an employee in the BeatleShow.

b. Carter's Discharge

Carter's discharge from the BeatleShow followed from her Vegas! The Show contract not being renewed. The *Wright Line* analysis applies.

In addition to the protected concerted activity detailed above, I find that Carter engaged in protected concerted activity when she complained about moving the arrow on the BeatleShow set. McCoy testified that he first spoke with Carter in connection with her refusal to move the arrow across the stage. Carter was

not the only person who complained about moving the arrow, which had fallen on Van Samback. I find, however, that the complaint about the arrow is attenuated from the decision to discharge Carter from the BeatleShow.

By the time Saxe informed McCoy that Carter was not being renewed for Vegas! The Show, McCoy had already decided to limit her schedule in the BeatleShow. McCoy's stated reason was that he thought some of the other dancers had more of the pretty girl next door look he wanted. The Acting General Counsel asserts that this rationale is suspect, because McCoy saw her during rehearsals and did not raise this as a concern. McCoy never asserted that Carter was unqualified for the BeatleShow and he did not exaggerate his testimony regarding her look. The evidence shows he found her suitable for the show but preferred some of the other dancers. I credit his testimony, as it was consistent and clear, and is not refuted.

The Acting General Counsel further asserts that I should draw an adverse inference based on Martina's failure to testify about his evaluation of Carter during rehearsals for the BeatleShow. Neither McCoy nor Saxe raised issues with Carter's dancing in the BeatleShow, however, and McCoy noted Carter was a "qualified dancer." (Tr. 441.) McCoy is the visionary behind the BeatleShow, and therefore Martina's failure to find Carter's look was not the best fit for the show does not warrant an adverse inference. It is clear that Carter's non-renewal for Vegas! The Show spurred the decision to discharge her from the BeatleShow. However, because I do not find her non-renewal for Vegas! The Show was retaliation based on her protected concerted activities there, and I do not find McCoy independently retaliated against her, I find the discharge did not violate the Act as alleged. Accordingly, I recommend dismissal of this complaint allegation.

CONCLUSIONS OF LAW

1. The Respondents are a single employer engaged in commerce and in business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondents violated Section 8(a)(1) of the Act by maintaining overly broad and discriminatory clauses in its employment contracts requiring wages and other terms and conditions of employment to remain confidential and requiring employees to acknowledge their employment is non-union with penalties for breach of any contract provision.

3. The Respondents violated Section 8(a)(1) of the Act by prohibiting employees from engaging in protected concerted activities and threatening and demeaning employees for engaging in protected concerted activities as set forth herein.

4. The Respondents did not engage in any other of the unfair labor practices alleged this consolidated proceeding.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find they must be ordered to cease and desist and to take certain affirmative action, including the posting of the customary notice, designed to effectuate the policies of the Act.

Having unlawfully promulgated and maintained a contract provision prohibiting employees from discussing wages or working conditions, the Respondents will be ordered to rescind the provision and cease and desist from enforcing it.

Having unlawfully promulgated and maintained a contract provision requiring employees to acknowledge they are not under the jurisdiction of a union and threatening penalties for breach, the Respondents will be ordered to rescind the provision and cease and desist from enforcing it.

Having engaged in unlawful prohibition of employees from engaging in protected concerted activities and threatening and demeaning of employees engaged in protected concerted activities, the Respondent will be ordered to cease and desist from these actions.

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, slip op. at 15–16 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id, slip op. at p. 3. See, e.g., *Teamsters Local 25*, 358 NLRB No. 54 (2012).

Accordingly, on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

PROPOSED ORDER

The Respondents, David Saxe Productions, LLC, Vegas! The Show, LLC, and Fab Four Live, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Enforcing the contract provision prohibiting employees from discussing their wages and working conditions with each other.

(b) Enforcing the contract provisions requiring employees to acknowledge they are nonunion and threatening penalties for breach.

(c) Prohibiting employees from engaging in protected concerted activities.

(d) Threatening employees with adverse consequences for engaging in protected concerted activities.

(e) Demeaning employees for engaging in protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind any contract provision prohibiting employees from discussing their wages and working conditions with each other.

[35] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Rescind the contract provisions requiring employees to acknowledge they are nonunion and threatening penalties for breaching this requirement.

(c) Within 14 days after service by the Region, post at its Las Vegas, Nevada facilities, including South Commerce Street and the Saxe Theater, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 27, 2011.

(d) Within 21 days after service by the Region, filed with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 7, 2013

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly

WE WILL NOT threaten or demean you for engaging in protected concerted activities, including complaining to us about your wages, hours, and working conditions by requesting pay for rehearsal time, days off, holiday pay, time and half pay for nights when one show is performed, loosening "meet and greet" requirements in order to allow employees to properly stretch and take a break in between shows, and requesting additional assistance by hiring more full-time understudy employees as opposed to part-time or swing employees.

WE WILL NOT prohibit you for engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

DAVID SAXE PRODUCTIONS, LLC AND VEGAS! THE SHOW, LLC